Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PFIZER INC,

Petitioner,

vs.

TEXAS PROPERTY and CASUALTY INSURANCE GUARANTY ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTIONS PRESENTED

This petition presents the following questions:

1. Did *Carden v. Arkoma Associates* establish a bright line test that for diversity purposes limits juridical citizenship to corporations only?

2. Did *Carden v. Arkoma Associates* preclude the judicial branch of the United States from even considering whether any entity, other than a corporation, has juridical citizenship for diversity purposes?

3. Is the Texas Property and Casualty Insurance Guaranty Association, a quasi-governmental agency, a juridical citizen of Texas for purposes of diversity jurisdiction?

4. Did the Texas Legislature unconstitutionally limit the jurisdiction of federal courts by denominating the Texas Property and Casualty Insurance Guaranty Association an "association" rather than a "corporation"?

5. Can the Texas legislature enable the Texas Property and Casualty Insurance Guaranty Association to defeat federal jurisdiction by naming it an association as opposed to a corporation?

LISTING OF PARTIES

1. Petitioner: Pfizer Inc

2. Respondent: Texas Property and Casualty Insurance Guaranty Association

CORPORATE DISCLOSURE STATEMENT

Pfizer Inc has no parent corporations. No publically held companies own more than ten percent of Pfizer Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LISTING OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1

ARGUMENT AND AUTHORITIES 3

I. The Texas Fund Is a Unique, Quasi-Governmental Entity, that Is a Juridical Citizen of Texas for Diversity Purposes 4

II. The Texas Legislature Improperly Limited the Jurisdiction of the Federal Courts 13

CONCLUSION 17

PRAYER 18

APPENDIX:

Order of the United States Court of Appeals, Fifth Circuit ..... App. 1

Order of the United States District Court for the Western District of Texas, Austin Division ..... App. 3

TABLE OF CONTENTS – Continued

Page

Texas Property and Casualty Insurance Guaranty Association's Certificate of Interested Persons....App. 6

Fifth Circuit Rule 28.2.1 .....App. 7

U.S. Constitution, Article III .....App. 9

U.S. Constitution, Article VI .....App. 10

28 U.S.C. § 1332 (1993 & Supp. 1999) .....App. 11

Texas Property and Casualty Insurance Guaranty Act .....App. 12

Texas Property and Casualty Insurance Guaranty Association Plan of Operation .....App. 18

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arthur v. E.I. DuPont de Nemours & Co., 58 F.3d 121 (4th Cir. 1995) 15

Beach v. Owens-Corning Fiberglas Corp., 728 F.2d 407 (7th Cir. 1984) 15

Begay v. Kerr-McGee Corp., 682 F.2d 1311 (9th Cir. 1982) 15

Carden v. Arkoma Assoc., 494 U.S. 185 (1990) 3, 9

Chapman v. Barney, 129 U.S. 677 (1889) 9

Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 499 (1900) 9

Harrison v. St. Louis & S.F.R. Co., 232 U.S. 318 (1914) 13, 14

Jefferson County v. Acker, 92 F.3d 1561 (11th Cir. 1996) 15

JMTR Enter., L.L.C. v. Duchin, 42 F.Supp.2d 87 (D. Mass. 1999) 7

Louisville, C.&C.R. Co. v. Letson, 43 U.S. 497 (1844) 6

McKeown v. LTV Steel Co., 117 F.R.D. 139 (N.D. Ind. 1987) 17

Navarro Sav. Ass'n v. Lee, 446 U.S. 458 (1980) 6, 7, 8, 10

Poitra v. Demarrias, 502 F.2d 23 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975) 15

Puerto Rico v. Russell & Co., 288 U.S. 476 (1933) 3, 6, 8, 10

TABLE OF AUTHORITIES – Continued

Page

Rundle v. Delaware & Raritan Canal, 55 U.S. 80 (1852) 14

Streeter v. Amerequip Corp., 968 F.Supp. 624 (D. Wyo. 1997) 15

Temple Drilling Co. v. Louisiana Ins. Guar. Ass'n, 946 F.2d 390 (5th Cir. 1991) 4, 7

Truck Components, Inc. v. Beatrice Co., 143 F.3d 1057 (7th Cir. 1998) 15

United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965) 9

Webb v. Tom Brown, Inc., 807 F.2d 783 (9th Cir. 1987) 15

Wildner Contracting Co., Inc. v. Ohio Turnpike Comm'n, 913 F.Supp. 1031 (N.D. Ohio 1996) 16, 17

STATE CASES

In re Texas Property and Cas. Ins. Guar. Ass'n, 989 S.W.2d 880 (Tex. App. – Austin 1999, no writ) 12

Texas Property and Cas. Ins. Guar. Ass'n v. Boy Scouts, 947 S.W.2d 682 (Tex. App. – Austin 1997, no writ) 10

FEDERAL RULES

5th Cir. R. 28.2.1 10

STATE STATUTES

TEX. INS. CODE ANN. Art. 21-28-C (Vernon 1981 & Supp. 1999) 5, 10, 11, 12

OPINIONS BELOW

The Opinion of the United States Court of Appeals, Fifth Circuit, is reproduced in the appendix to this petition. App. 1. The Order of the United States District Court for the Western District of Texas, Austin Division, is reproduced in the appendix to this petition. App. 3.

JURISDICTIONAL STATEMENT

The Order of the United States Court of Appeals, Fifth Circuit, was entered on February 9, 2000. This petition was timely filed pursuant to Supreme Court Rule 13 within 90 days after the entry of judgment of the United States Court of Appeals, Fifth Circuit. Cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari. 28 U.S.C. § 1254 (1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III of the United States Constitution is reproduced in the appendix. App. 9. Article VI, clause 2 of the United States Constitution is reproduced in the appendix. App. 10. In addition, 28 U.S.C. § 1332 is reproduced in the appendix. App. 11.

STATEMENT OF THE CASE

The Texas Property and Casualty Insurance Guaranty Association ("Texas Fund") was created by the Texas legislature as a part of its program to regulate insurance

companies admitted to do business in Texas. The Fund is available for two categories of claimants: 1) Texas residents whose claims have not been paid because an insurance carrier admitted to do business in Texas ("Admitted Carrier") is insolvent, and 2) policyholders, like Pfizer, who have paid Texas residents for claims because of an Admitted Carrier's insolvency. In order to become an Admitted Carrier in Texas, an insurance company must contribute money to the Texas Fund. It is those contributors who are "members" of the Texas Fund. The Admitted Carriers receive a state tax credit to offset the contribution to the Fund. The Texas Fund, therefore, is actually funded by the State of Texas and its residents. The "members" have no control over the Fund's assets, business, or involvement in litigation.

This dispute arises because Pfizer paid claims to Texas residents that should have been, but were not, paid by Texas Admitted Carriers that were insolvent. Pfizer presented a claim on the Texas Fund for reimbursement of amounts it paid to Texas claimants that should have been covered by the insolvent insurance companies or by the Texas Fund. Pfizer's claim to the Texas Fund was denied. As a result, this lawsuit was filed in federal court based on diversity of citizenship.

The Texas Fund filed a Motion to Dismiss based on lack of diversity. Pfizer is not a Texas citizen. It is a Delaware corporation with its principal place of business in New York. The Texas Fund, a quasi-governmental agency, was denominated by the Texas legislature as an "association" rather than a "corporation." The district court granted the Motion to Dismiss and concluded that it was bound by precedent to find that the Texas Fund is

not a juridical citizen[1] of Texas, but a citizen of every state in which its "members" are citizens. This decision was affirmed by the United States Court of Appeals for the Fifth Circuit. Pfizer respectfully urges that the Texas Fund is a juridical citizen of Texas for diversity purposes, and therefore the courts below committed error.

ARGUMENT AND AUTHORITIES

The first three questions presented are interrelated and will be argued under Section I. Pfizer argues that, contrary to the position taken by the lower courts, *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), did not establish a bright line test that precludes federal courts from even considering whether a non-corporate entity has juridical citizenship. Specifically, Pfizer argues that the Texas Fund is a juridical citizen of Texas. It is not like any organization previously examined by this Court in a diversity case. The Texas Fund has no real "members." It has no functional existence outside of Texas. It is a quasi-governmental agency controlled by the State of Texas.

In Section II, questions four and five will be addressed. Pfizer argues that the Texas legislature has unconstitutionally abridged the jurisdiction of the federal courts. If the Texas legislature had denominated the Texas Fund a corporation, the federal court would have subject matter jurisdiction based on diversity of citizenship. If

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[1] The term "juridical citizen" is used as it was in *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), to mean an entity that has citizenship status independent and apart from its membership.

only corporations have juridical citizenship, the Texas legislature abridged the subject matter jurisdiction of the federal courts by denominating the Texas Fund an association. The designation given to the Fund by the Texas legislature should not control a federal court's decision about citizenship status for diversity purposes.

I.

The Texas Fund Is a Unique, Quasi-Governmental Entity, that Is a Juridical Citizen of Texas for Diversity Purposes

In this case, the United States Court of Appeals for the Fifth Circuit wrongly decided several important questions of federal law. Specifically, it decided that *Carden v. Arkoma Associates* established a bright line test for determining the citizenship of all organizations. Under that bright line test, only corporations have juridical citizenship for diversity purposes. Federal courts cannot even consider the issue of whether a particular non-corporate entity is a juridical citizen. Then, applying that bright line test to the Texas Fund, the Fifth Circuit decided that, because the Texas legislature called the Texas Fund an "association," the Texas Fund is not a juridical citizen of Texas. Instead, it is a citizen of every state in which its "members" are citizens.

Application of the Bright Line Test of *Carden*

In the order at issue in this case, the Fifth Circuit did not address the merit of Pfizer's position, but held, as it did in *Temple Drilling Co. v. Louisiana Insurance Guaranty*

Association, 946 F.2d 390 (5th Cir. 1991), that *Carden* established a bright line test that put corporations on one side of the juridical citizenship line and all other entities, including unincorporated associations, on the other. Neither *Carden*, nor any other decision of this Court, has addressed the citizenship of a unique, quasi-governmental entity, like the Texas Fund.

This Court should clarify that *Carden* does not establish a bright line test that precludes federal courts from even considering the issue of whether a particular organization is a juridical citizen. Based on appropriate application of analogous cases, logic, public policy and fundamental fairness, this Court should grant the writ and hold that the Texas Fund is a juridical citizen of Texas for purposes of deciding diversity jurisdiction.

The Texas Fund is not an investment vehicle like the limited partnership in *Carden*. In fact, the Texas Fund is not like any private business organization that previous Supreme Court cases have discussed in determining citizenship for purposes of diversity jurisdiction. The Texas Fund was created by the Texas legislature to perform a public function, namely regulation of Texas Admitted Carriers. *See* TEX. INS. CODE ANN. Art. 21-28-C, sec. 6 (Vernon 1981 & Supp. 1999); *see also* Texas Property and Casualty Insurance Guaranty Association Plan of Operation, App. 18. The Texas Fund is simply a fund of money. This money comes from insurance sales made in Texas. The funds are held in trust for Texas residents and insureds, like Pfizer, that have paid Texas residents, when a Texas Admitted Carrier becomes insolvent. The Texas Fund is regulated by the State of Texas, and is directly

administered by the Texas Insurance Commissioner, an official of the State of Texas.

Development of the Court's Diversity Jurisdiction Analysis

Previous decisions of this Court are instructive, but not precedential. Past cases have addressed investment vehicles or other types of private business organizations. No prior case before this Court has decided the citizenship of an organization remotely similar to the Texas Fund.

Long ago, this Court held that a corporation is a juridical citizen independent of its shareholders for diversity purposes. *Louisville, C.&C.R. Co. v. Letson*, 43 U.S. 497, 558 (1844). Importantly, this decision was not directed, influenced or informed by any specific legislation. Congress did not address corporate citizenship for diversity purposes for more than 100 years after *Letson* was decided.

After *Letson*, this Court has examined other investment vehicles and forms of private business organizations to determine their citizenship status for diversity purposes. When doing so, this Court has not applied a bright line test, granting juridical citizenship to corporations and denying it to all other business organizations. Instead, this Court has reached different results based on the particular characteristics of the organization at issue. Twice this Court has granted juridical citizenship status to non-corporations. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980) and *Puerto Rico v. Russell & Co.*, 288 U.S. at 481. *Carden*, itself, cannot correctly be read as establishing a

bright line test, limiting juridical citizenship to corporations and denying it to all other entities, because *Carden* did not overrule *Navarro* or *Russell*.[2]

Exceptions to the Bright Line Rule

In *Navarro Savings Ass'n v. Lee*, the organization at issue was a **business trust.** 446 U.S. at 459. That organization was plaintiff in a suit filed in the United States District Court for the Northern District of Texas based on diversity. The defendant was a Texas citizen and asserted lack of diversity, because some of the trust's beneficial shareholders were also Texas residents. This Court held that the trust, although technically an unincorporated

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[2] The *Carden* opinion does not state that it is applying a bright line rule. However, as exhibited by the decisions of the lower courts in this case, that is the application being given to *Carden*. *See also Temple Drilling*, 946 F.2d at 393 (stating that in *Carden*, the Supreme Court "held that, with the exception of corporations, the citizenship of an artificial entity for purposes of diversity is the citizenship of each of the entity's constituent members."); *JMTR Enter., L.L.C. v. Duchin*, 42 F.Supp.2d 87, 94 (D. Mass. 1999) (observing that in *Carden*, the Supreme Court declined to expand juridical citizenship to any entity other than a corporation).

Carden can certainly be read as an opinion that reflects a decided bias against any unreasonable expansion of diversity jurisdiction. The burden imposed by diversity jurisdiction is unquestionably great. Granting juridical status to investment vehicles, and private business organizations that do business interstate and internationally, would dramatically add to the federal court case load. That is not the case with granting juridical status to the Texas Fund, which is unquestionably linked to Texas and no other state.

association, had citizenship status distinct from its beneficial shareholders. *Id.* at 465. Those shareholders, this Court held, were not "real parties in interest." Writing for eight members of the Court, Justice Powell stated:

> Early in its history, this Court established that the "citizens" upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy [citations omitted]. Thus, a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.

Id. at 460-61. If this remains a correct statement of the law, the Texas Fund is unquestionably a juridical citizen of Texas. The "members" of the Texas Fund are not real and substantial parties to the controversy.

In *Puerto Rico v. Russell & Co.*, this Court held that the business organization in question, a Puerto Rican ***sociedad en comandita,*** although an unincorporated association, had citizenship distinct from its members. This Court focused on the close relationship between Puerto Rico and the *sociedad's* organizational format. This Court rejected the "false analogy" that the *sociedad* was another incarnation of a partnership, and emphasized that the *sociedad* could not function outside of Puerto Rico. 288 U.S. at 480-81.

Carden did not overrule either *Navarro* or *Russell.* Obviously, the Court recognized that some organizations that are not corporations can have juridical status. Therefore, a bright line test is inconsistent with the holdings of *Navarro* and *Russell.*

In other instances, this Court has found that the organization under investigation did not have citizenship distinct from its members. This was true of a **joint stock corporation**, *Chapman v. Barney*, 129 U.S. 677 (1889), **labor union**, *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965), and **limited partnerships**, *Carden v. Arkoma Associates*, 494 U.S. at 195, and *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900). In all of these cases, the "members" had equivalent power and control of the association's assets, business, and litigation. *Carden*, 494 U.S. at 204 (O'Connor, J., dissenting).

The Texas Fund is structured differently from any organization that has been denied juridical citizenship. None of its "members" have control over the Fund's assets, business, or involvement in litigation. These functions are carried out by the Texas Attorney General and the Insurance Commissioner – officials of the State of Texas.

The Texas Fund is a Juridical Citizen of Texas

The Texas Fund is a juridical citizen of Texas. The Texas Fund and the State of Texas are virtually inseparable. The Texas Fund does not meaningfully exist or function outside of Texas. In fact, when sued outside Texas, the Texas Fund, itself, argues that it has no minimum contacts with any state but Texas.[3]

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[3] In Texas, the law is that Texas courts have no personal jurisdiction over an out-of-state guaranty fund even if a "member" is a Texas citizen. This is inconsistent with the premise that a member insurance company is a real party in

Although logical consistency is not always legally determinative, logical absurdities threaten the rule of law and should be avoided. Asserting that the Texas Fund has no minimum contacts in any state other than Texas, but at the same time asserting that, for diversity purposes, the Texas Fund is a citizen of virtually every state, is a logical contradiction that no amount of tortured reasoning can reconcile. The Texas Fund has no real "members." The reality is that the entire purpose and function of the Texas Fund is rooted in Texas and limited to Texas. The Fund is a Texas citizen.

Importantly, the "members" of the Texas Fund were not even listed by the Texas Fund as "interested persons" when the Texas Fund executed its "Certificate of Interested Persons" in its brief to the Fifth Circuit as required by Fifth Circuit Rule 28.2.1. *See* App. 6-8. This omission boldly reflects the reality that the "members" of the Texas Fund are not "real and substantial parties to the controversy." *See Navarro,* 446 U.S. at 460-61. The Fund, controlled by the State of Texas, is an independent entity that is a juridical citizen only of Texas.

The Texas Fund may act and sue and be sued in its own name. TEX. INS. CODE ANN. Art. 21-28-C sec. 8(h)(3). Its "members are not thought to have a sufficient personal interest in the suit brought against the entity to entitle them to intervene as party defendant." *See Russell,*

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interest. *See Texas Property and Cas. Ins. Guar. Ass'n v. Boy Scouts,* 947 S.W.2d 682 (Tex. App. – Austin 1997, no writ). It is also grossly inconsistent with the argument that such a fund is, for diversity purposes, not a citizen of Texas because it has out-of-state "members."

288 U.S. at 481; *see also* TEX. INS. CODE ANN. Art. 21-28-C, sec. 11(d).

Public Policy invoked in *Carden* Does Not Apply to the Texas Fund

The public policy that supports *Carden* and similar decisions simply is not applicable to the Texas Fund. The very essence of the Texas Fund is unlike any investment vehicle or private organization such as a limited partnership. The Texas Fund is not an organizational vehicle for capitalizing a virtually limitless assortment of business ventures able to transact business throughout the United States and the world. It is a specific fund of money created by the Texas government and financed exclusively by funds generated in Texas. It was established for the benefit of Texas residents, and others, like Pfizer, who have paid Texas residents, when an insolvent Texas Admitted Carrier did not.

The exclusive connection between the State of Texas and the Texas Fund is illustrated by the following facts. All funds collected by the Texas Fund must be deposited with the Texas Treasury Safekeeping Trust Company. *Id.* sec. 8(j). All activities of the Texas Fund are effectively controlled by the Texas State Insurance Commissioner. The Texas Fund is administered by a "plan of operation," that is effective only after approval by the Texas State Insurance Commissioner. *Id.* sec. 9(a); *see also* App. 18-33. This plan of operation establishes procedures for handling the assets of the Texas Fund, methods of reimbursement, claims filing, and acceptable forms of proof of

covered claims. TEX. INS. CODE ANN. Art. 21-28-C, sec. 9(c); *see also* App. 26-7. The plan of operation, in fact, governs the day-to-day operations of the Texas Fund. TEX. INS. CODE ANN. Art. 21-28-C, sec. 9(f).

Like other governmental or quasi-governmental agencies, the Texas Fund is exempt from State of Texas taxation. *Id.* sec. 15. The Texas Fund, its agents, and employees all are granted immunity by the State of Texas from liability. *Id.* sec. 15, 16(a). The Texas Attorney General is charged with representing the Fund for any act for which it enjoys immunity. *Id.* sec. 16(b). The Texas Fund is also permitted to contract with the Texas Attorney General under the Interagency Cooperation Act, a right that the Texas Fund has only because it is so closely affiliated with the State of Texas. *Id.*

These provisions establish that the Texas Fund is a fundamentally public and quasi-governmental entity. It is exclusively tied in appearance and, in fact, with the State of Texas, and does not function in any other state. Tellingly, the Texas Attorney General has actually argued that the Texas Fund is quasi-governmental. *See In re Texas Property and Cas. Ins. Guar. Ass'n,* 989 S.W.2d 880, 886 (Tex. App. – Austin 1999, no writ).

No prior opinions of this Court have addressed the citizenship of a quasi-governmental organization or any organization so closely identified with a particular state as the Texas Fund is identified with the State of Texas. The organizations addressed in *Navarro* and *Russell* are much more analogous to the Texas Fund than any of the other organizations previously reviewed by this Court. For example, the key characteristic of the *sociedad* cited in

Russell to support separate citizenship for that organization, *i.e.*, its close association with Puerto Rico, is similar to the Texas Fund. The relationship between the Texas Fund and the State of Texas, however, is much closer than the relationship between the *sociedad* and Puerto Rico.

II.

The Texas Legislature Improperly Limited the Jurisdiction of the Federal Courts

If the Texas legislature had denominated the Texas Fund a "corporation" instead of an "association," Pfizer, unquestionably, would be entitled to litigate this case in federal court under diversity jurisdiction. A state cannot constitutionally limit the jurisdiction of the federal courts. Yet, if only corporations are entitled to juridical status, the State of Texas, by denominating the Texas Fund an association, has ousted federal courts of jurisdiction they would otherwise have. This violates the Constitution. Infringement on the power of the federal courts by the states is prohibited by the interrelationship between Article III, § 2 and the Supremacy Clause of the Constitution of the United States.

A State May Not Defeat Federal Jurisdiction

The United States Constitution creates the power of the federal judiciary and "the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious" that Constitutional power. *Harrison v. St. Louis & S.F.R. Co.*, 232 U.S., 318, 328 (1914). The "doctrine is so elementary

as to require no citation of authority to sustain it." *Id.* *Harrison* involved an attempt by the legislature of Oklahoma to defeat diversity jurisdiction by "arbitrarily creating a fictitious legal status incompatible with [diversity jurisdiction]." *Id.* at 336. Oklahoma legislated that all persons and entities that conducted business in Oklahoma were deemed citizens of Oklahoma, and, if they asserted otherwise in any court, their right to do business in Oklahoma was forfeited. Indirectly, but just as effectively, the Texas legislature has done the same in this case by denominating the Texas Fund an "association" and requiring "membership" in the Fund as a prerequisite for writing insurance in Texas.

In *Rundle v. Delaware & Raritan Canal*, the Court used the following words to describe the Constitutional genesis of the power of the federal courts, and the wisdom that demands that the federal courts diligently protect their power from state infringement:

> If the federal courts [c]ould be ousted of jurisdiction, and citizens of other States be forced into the State courts, without the power of election, they would often be deprived, in great cases, of all benefits contemplated by the Constitution; and in many cases be compelled to submit their rights to judges and juries who are inhabitants of the city where the suit must be tried, and to contend with powerful corporations, where the chances of impartial justice would be greatly against them; and where no prudent man would engage with such an antagonist.

55 U.S. 80, 95 (1852).

The states "have no power to enlarge or contract the federal jurisdiction." *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1315 (9th Cir. 1982). Thus, state law may not control or limit the diversity jurisdiction of federal courts. *Id.*; *see also Truck Components, Inc. v. Beatrice Co.*, 143 F.3d 1057, 1061 (7th Cir. 1998); *Webb v. Tom Brown, Inc.*, 807 F.2d 783, 784 (9th Cir. 1987); *Beach v. Owens-Corning Fiberglas Corp.*, 728 F.2d 407, 409 (7th Cir. 1984); *Streeter v. Amerequip Corp.*, 968 F.Supp. 624, 627 (D. Wyo. 1997).

Federal Courts Are Charged with Zealously Guarding Their Jurisdiction

Federal courts "have an affirmative responsibility to guard their own jurisdiction." *Poitra v. Demarrias*, 502 F.2d 23, 26 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975). "Any attempt by a state or local government to tell a federal judge what he or she must do to lawfully perform federal duties offends elemental notions of federal supremacy." *Jefferson County v. Acker*, 92 F.3d 1561, 1572-73 (11th Cir. 1996).

State statutes will not be applied to thwart the purposes of statutes of the United States. Although the Texas legislature did not directly divest the federal courts of jurisdiction over the Texas Fund, calling the Texas Fund an association had this impermissible effect if a bright line test is applicable to the Texas Fund. An indirect restriction on federal jurisdiction is also inappropriate, as other courts have specifically held that a state cannot "by definition or characterization" enlarge or narrow federal jurisdiction. *Arthur v. E.I. DuPont de Nemours & Co.*, 58 F.3d 121, 125 (4th Cir. 1995).

The citizenship of a state created entity should be controlled by two factors: where it was created and its principal place of business. In *Wildner Contracting Co., Inc. v. Ohio Turnpike Commission*, a federal court considered the citizenship of the Ohio Turnpike Commission ("OTC") for purposes of diversity jurisdiction. 913 F.Supp. 1031 (N.D. Ohio 1996). The federal court had no difficulty with recognizing the OTC as a citizen of Ohio. "Wildner is a citizen of Pennsylvania, where it is incorporated and has its principal place of business. Similarly, the OTC is a citizen of Ohio, since it was created by the State of Ohio and has its principal place of business in Berea, Ohio." *Id.* at 1037. The federal court did not hesitate in recognizing the OTC was a citizen of Ohio because it was so closely tied to that specific state. Based on the characteristics of the OTC and the plaintiff, the court concluded "the requirements for the exercise of diversity jurisdiction are satisfied." *Id.*

The Ohio legislature attempted to require that suits against the OTC be brought in the state's court of common pleas. *Id.* As a result of this statute, the federal court would have been prevented from exercising jurisdiction over the OTC. Importantly, the same Ohio statute creating the OTC also stipulated that the OTC could "sue and be sued in its own name." *Id.* (*citing* Ohio Rev. Code § 5537.04(A)). The federal court wrote that Ohio was certainly permitted to wrap itself and the entities it created in a cloak of sovereign immunity. "However, once a state elects to make a state-created entity subject to suit, the entity is subject to the provisions of Article III, § 2 of the United States Constitution and 28 U.S.C. § 1332(a)(1) giving the federal courts jurisdiction over claims between

citizens of different states." *Id.* (citations omitted). The court concluded "Ohio chose to make the OTC amenable to suit. It cannot by statute subsequently divest this Court of its diversity jurisdiction over the OTC." *Id.*

Texas also permits the Fund to sue and be sued. By denominating the Texas Fund an association, rather than a corporation, the State of Texas cannot divest this Court of diversity jurisdiction it would otherwise have but for the action of the state legislature.

The federal courts have a constitutionally mandated duty to protect their own jurisdiction, and may not abandon a case they have the power to hear to a state court. As a result, federal courts are vigorous in the defense of their own jurisdiction when state legislatures attempt to divest them of jurisdiction. *See McKeown v. LTV Steel Co.*, 117 F.R.D. 139, 143 (N.D. Ind. 1987) (citing *In re Martin-Trigona*, 737 F.2d 1254, 1261 (2d Cir. 1984), *cert. denied*, 474 U.S. 1061 (1986)). A state may not enact legislation requiring a federal court to turn over a matter to the state courts, yet this is precisely the effect of the Texas Property and Casualty Insurance Guaranty Act, if the bright line test is applicable.

CONCLUSION

Carden v. Arkoma Associates did not establish a bright line test determining that only corporations have juridical status. That decision did not overrule *Navarro* and *Russell*, and this underscores the fallacy that juridical citizenship is granted only to incorporated entities. Federal courts are entitled to evaluate the juridical citizenship of unique

non-corporate entities when determining diversity jurisdiction. Upon evaluating the Texas Fund, the Court should determine the Texas Fund is a juridical citizen of Texas. The Texas legislature's decision to name the Texas Fund an association cannot be permitted to limit the jurisdiction of the federal courts.

PRAYER

Pfizer Inc respectfully requests this Court to grant this Petition for Writ of Certiorari and to review and reverse the Order Granting the Motion to Dismiss of the United States District Court for the Western District of Texas, Austin Division, in its Cause No. A99-CA-143SS, rendered on August 3, 1999 and the Opinion of the United States Court of Appeals, Fifth Circuit, rendered on February 9, 2000.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 99-50895
Summary Calendar

PFIZER INC,

Plaintiff-Appellant,

v.

TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas
(A-99-CV-143-SS)

(Filed Feb. 9, 2000)

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:*

Pfizer, plaintiff-appellant, appeals the dismissal of the case by the district court for lack of subject matter jurisdiction. We have reviewed the record and the parties'

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

briefs and AFFIRM for essentially the same reasons stated by the district court in its order dated August 3, 1999.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

PFIZER, INC.,	§	
Plaintiff	§	
	§	
vs.	§	
TEXAS PROPERTY AND	§	**NO. A 99 CA 143 SS**
CASUALTY INSURANCE	§	
GUARANTY	§	
ASSOCIATION,	§	
	§	
Defendant	§	

ORDER

(Filed Aug. 3, 1999)

BE IT REMEMBERED that on the 3rd day of August 1999, the Court reviewed the file in the above-styled cause and specifically Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction [#4] and Pfizer, Inc.'s Response to Defendant's Motion to dismiss [#5]. The Court also received a letter brief in reply to the plaintiff's response, but the letter brief was not properly filed with the Clerk of Court. Because the letter brief was apparently sent to opposing counsel, however, the Court will admonish the defendant to properly file motions and briefs and order the Clerk of Court to file the defendant's letter brief, which is attached hereto as Appendix A. The parties dispute whether this Court has subject matter jurisdiction under 28 U.S.C. § 1332, which provides for diversity of citizenship jurisdiction. After a review of the entire record, the Court is of the opinion that subject

matter jurisdiction pursuant to 28 U.S.C. § 1332 does not exist in this case and therefore dismisses the case.

The single issue before the Court is whether the defendant Texas Property and Casualty Insurance Guaranty Association ("TPCIGA") is solely a citizen of Texas or whether it is an association with citizenship in every state in which it has a member, including New York. It is undisputed that the plaintiff is a corporation with citizenship for purposes of diversity jurisdiction in New York and Delaware, and the amount in controversy exceeds $75,000. Therefore, if the defendant is construed as only a citizen of Texas for diversity purposes, there is diversity jurisdiction under 28 U.S.C. § 1332. If the defendant is considered a citizen of every state in which it has members, there is no diversity of citizenship and no basis for federal jurisdiction.

According to Texas statute, "The Texas Property and Casualty Insurance Guaranty Association is a nonprofit, unincorporated legal entity composed of all member insurers who must be members of the association as a condition of their authority to transact insurance in this state." TEX. INS. CODE ANN. art. 21.28-C, § 6. The defendant has filed an affidavit including certificates of authority that show that members of the TPCIGA are citizens of New York. *See* Defendant's Motion to Dismiss [#4], Exh. A.

The Fifth Circuit has held that an unincorporated association analogous to the TPCIGA is a citizen of every state in which it has members, destroying diversity jurisdiction. *See Temple Drilling Co. v. Louisiana Ins. Guar. Ass'n*, 946 F.2d 390, 393 (5th Cir. 1991). *Temple Drilling*

follows the Supreme Court precedent that states that with the exception of corporations, the citizenship of an entity or association made up of multiple members must be determined by the citizenship of all the members. *See Carden v. Arkoma Assocs.*, 110 S. Ct. 1015, 1021 (1990). Because the Texas statute states unequivocally that the TPCIGA is "unincorporated," the bright-line rule of *Carden* would dictate the result in this case even without the on-point, binding Fifth Circuit precedent in *Temple Drilling*. The plaintiff urges this Court to disregard Fifth Circuit and Supreme Court[1] precedent, but the Court rejects this invitation. Under the law this Court is bound to follow, TPCIGA is a citizen of every state in which it has a member, including New York, and there is no complete diversity as required to confer federal jurisdiction under 28 U.S.C. § 1322. This case will therefore be dismissed.

For the foregoing reasons, the Court enters the following orders:

IT IS ORDERED that the Clerk of Court FILE the attached letter brief of the defendant as a Reply to the Plaintiff's Response to the Defendant's Motion to Dismiss;

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[1] The plaintiff notes the Supreme Court decision was 5-4, but 5 votes is all that is needed to bind this Circuit and this Court, and a 5-4 decision is certainly not a rare phenomenon. Moreover, *Carden* is a remarkablly [sic] straightforward, coherent Supreme Court decision because it lacks the now-popular concurrences, concurrences in part, dissents in part and concurrences in the opinion, and special dissents.

IT IS FURTHER ORDERED that the Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction [#4] is GRANTED; and

IT IS FINALLY ORDERED that the above-styled and numbered cause is DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction.

SIGNED on this the 3rd day of August 1999.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

CERTIFICATE OF INTERESTED PERSONS

Case No. 99-50895

Pfizer, Inc. v. Texas Property and
Casualty Insurance Guaranty Association

The undersigned counsel of record for the Texas Property and Casualty Insurance Guaranty Association certifies that the following persons have an interest in the outcome of the case. These representations are made in order that Judges on this Court may evaluate possible disqualification or recusal:

1) Appellant Pfizer, Inc.

2) Appellee Texas Property and Casualty Insurance Guaranty Association.

3) Jack E. Urquhart and Pamela A. Clark of Beirne, Maynard & Parsons, L.L.P., Counsel for Pfizer, Inc.

4) Daniel Jordan of Jordan & Carmona, P.C., Counsel for Texas Property and Casualty Insurance Guaranty Association.

/s/ Daniel Jordan
Daniel Jordan
Attorney of record for Appellee

LOCAL RULE

28.2.1 Certificate of Interested Persons. *The certificate of interested persons required by this rule is broader in scope than the corporate disclosure statement contemplated in Fed. R. App. P. 26.1. The certificate of interested persons provides the court with additional information concerning parties whose participation in a case may raise a recusal issue. A separate corporate disclosure statement is not required. Counsel and unrepresented parties will furnish a certificate for all private (non-governmental) parties, both appellants and appellees, which must be incorporated on the first page of each brief before the table of contents or index, and which must certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. Each certificate must also list the names of opposing law firms and/or counsel in the case. The certificate must include all information called for by Fed. R. App. P. 26.1(a).*

(a) Each certificate must list all persons known to counsel to be interested, on all sides of the case, whether or not represented by counsel furnishing the certificate. Counsel has the burden to ascertain and certify the true facts to the court.

(b) The certificate must be in the following form:

(1) Number and Style of Case.

(2) The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

(Here list names of all such persons and identify their connection and interest.)

_____

*Attorney of record for*_____

_____

U.S. CONSTITUTION

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law

and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * *

ARTICLE VI

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

28 U.S.C. § 1332. (1993) Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

* * *

28 U.S.C. § 1332 (Supp. 1999) Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and cost, and is between –

* * *

TEXAS INSURANCE CODE

Art. 21.28-C (Vernon 1981 and Supp. 1999)

Sec. 5 (10) "Member insurer" means any insurer who:

(A) writes any kind of insurance to which this Act applies under Section 3 of this Act, including the exchange of reciprocal or inter-insurance contracts; and

(B) is licensed to transact insurance in this state, including any stock, mutual, Lloyds insurer, reciprocal or inter-insurance exchange, or county mutual insurance company.

* * *

Association

Sec. 6. The Texas Property and Casualty Insurance Guaranty Association is a nonprofit, unincorporated legal entity composed of all member insurers, who must be members of the association as a condition of their authority to transact insurance in this state. The association shall perform its functions under a plan of operation approved under Section 9 of this Act and shall exercise its powers through the board of directors. For purposes of administration and assessment, the association is divided into the workers' compensation insurance account, the automobile insurance account, and the account for all other lines of insurance to which this Act applies.

Board of Directors

Sec. 7. (a) The board of directors of the association is composed of nine persons who serve terms as established in the plan of operation. Five members shall be selected by member insurers, subject to the approval of the commissioner. To be eligible to serve as an insurance industry board member, a person must be a full-time employee of a member insurer. The remaining members shall be representatives of the general public appointed by the commissioner.

* * *

Sec. 8 (h) The association may:

* * *

(3) sue or be sued;

* * *

(j) The board of directors may deposit all money collected by the association into the Texas Treasury Safekeeping Trust Company in accordance with procedures established by the comptroller. The funds deposited shall be accounted for separately from all other funds by the comptroller to the association.

(k)(1) Notwithstanding Chapter 271, Acts of the 60th Legislature, Regular Session, 1967 (Article 6252-17, Vernon's Texas Civil Statutes), the board may hold an open meeting by telephone conference call if immediate action is required and the convening at one location of a quorum of the board is not reasonable or practical.

(2) The meeting is subject to the notice requirements applicable to other meetings.

(3) The notice of the meeting must specify as the location of the meeting the location where meetings of the board are usually held.

(4) Each part of the meeting that is required to be open to the public shall be audible to the public at the location specified in the notice of the meeting as the location of the meeting and shall be tape recorded. The tape recording shall be made available to the public.

Plan of operation

Sec. 9. (a) The association shall submit to the commissioner a plan of operation and any amendments necessary or suitable to ensure the fair, reasonable, and equitable administration of the association. The plan of operation and any amendments take effect on approval in writing by the commissioner.

* * *

(c) All member insurers shall comply with the plan of operation.

* * *

Duties and powers of commissioner

Sec. 10. (d) The commissioner shall suspend or revoke, after notice and hearing, the certificate of authority to transact insurance in this state of any member insurer that fails to pay an assessment when due or otherwise fails to comply with the plan of operation. As an alternative, the commissioner may assess a fine on any member insurer that fails to pay an assessment when due.

The fine may not exceed the lesser of five percent of the unpaid assessment per month or $100 per month.

* * *

(f) Any final action or order of the commissioner under this Act is subject to judicial review by a court of competent jurisdiction.

(g) Venue in a suit against the association or commissioner relating to any action or ruling of the association or commissioner made under this Act is in Travis County. The association or commissioner is not required to give an appeal bond in an appeal of a cause of action arising under this Act.

* * *

Examination of the association

Sec. 14. Not later than April 30 of each year, the association shall submit an audited financial statement to the state auditor for the preceding calendar year in a form approved by the state auditor's office.

Tax exemption

Sec. 15. The association is exempt from payment of all fees and all taxes levied by this state or any of its subdivisions except taxes levied on real or personal property.

Immunity; attorney general representation

Sec. 16. (a) There is no liability on the part of, and no cause of action of any nature arises against, any member insurer, the association or its agents or employees, the board of directors, receiver, special deputy receiver or its agents or employees, or the commissioner or the commissioner's representatives for any good faith action or failure to act in the performance of powers and duties under this Act.

(b) The attorney general shall defend any action to which Subsection (a) applies that is brought against a member insurer or its agents or employees, the association or its agents or employees, members of the association's board of directors, a special deputy receiver to its agents or employees, or the commissioner or the commissioner's representatives. This subsection continues to apply to an action instituted after the defendant's service with the guaranty association, commissioner, or department has terminated. The subsection does not require the attorney general to defend any person or entity with respect to an issue other than the applicability or effect of the immunity created by Subsection (a). The attorney general is not required to defend any member insurer of the association or its agents or employees, the association or its agents or employees, members of the association's board of directors, a special deputy receiver or its agents or employees with respect to any actions filed regarding the disposition of a claim filed with the guaranty association under this Act or to an issue other than the applicability or effect of the immunity created by Subsection (a). The association may contract with the attorney general under the Interagency Cooperation Act (Article

4413(32), Vernon's Texas Civil Statutes) to provide legal services not covered under this subsection.

* * *

Recognition of assessments in premium tax offset; assignment of credit

Sec. 21. (a) One hundred percent of any assessment paid by an insurer under this Act shall be allowed to that insurer as a credit against its premium tax under Article 4.10 of this code. The tax credit referred to in this section shall be allowed at a rate of 10 percent per year for 10 successive years following the date of assessment and, at the option of the insurer, may be taken over an additional number of years. The balance of any tax credit not claimed in a particular year may be reflected in the books and records of the insurer as an admitted asset of the insurer for all purposes, including exhibition in annual statements under Article 6.12 of this code.

(b) Available credit against premium tax allowed under Subsection (a) of this section may be transferred or assigned among or between insurers if:

(1) a merger, acquisition, or total assumption of reinsurance among or between the insurers occurs; or

(2) the commissioner by order approves the transfer or assignment.

TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION PLAN OF OPERATION

Sec. 1. General.

(a) The Texas Property and Casualty Insurance Guaranty Association is a non-profit, unincorporated legal entity created by Article 21.28-C, Texas Insurance Code, as amended.

(b) This plan of operation of the association is adopted pursuant to the requirements of the Act, and supersedes any prior plan of operation. This plan, and any amendments to this plan shall be adopted and become effective as provided in the Act, and shall govern the association and its operations. Provisions of the Act which are not expressly stated in this plan are incorporated in this plan by reference.

Sec. 2. Definitions.

In this plan:

"Act" means the Texas Property and Casualty Insurance Guaranty Act (Article 21.28-C, Vernon's Texas Insurance Code.)

"Association" means the Texas Property and Casualty Insurance Guaranty Association.

"Board" means the Board of Directors of the Texas Property and Casualty Insurance Guaranty Association.

"Commissioner" means the Commissioner of Insurance of the Texas Department of Insurance.

"Covered claim" has the meaning assigned by Section 5(8) of the Act.

"Designated official" shall mean and include any member of the board of directors and any employee of the association.

"Impaired Insurer" has the meaning assigned by Section 5(9) of the Act.

"Member Insurer" has the meaning assigned by Section 5(10) of the Act.

"Plan" means this plan of operation.

"Receiver" means the Commissioner of Insurance in his capacity as receiver pursuant to Art. 21.28, Texas Insurance Code or a Special Deputy Receiver appointed by the Commissioner.

Any additional definitions provided in the Act apply to this plan.

Sec. 3. Association.

(a) Membership.

(1) The Texas Property and Casualty Insurance Guaranty Association is a nonprofit, unincorporated legal entity composed of all member insurers, who must be members of the association as a condition of their authority to transact insurance in this state.

(2) Member insurers shall comply with this plan and the Act and failure to comply with this plan or the Act or to pay an assessment when due shall subject the member insurer to sanctions as provided in the Act.

(b) General Powers and Duties.

The powers and duties of the association are as set forth in this plan and more fully set forth in the Act.

(c) Right of Appeal.

A member insurer aggrieved by any final action or decision of the association regarding assessments may appeal to the board. After a final decision by the board, a member insurer may appeal that action or decision to the commissioner not later than the 30th day after the date of the action or decision.

Sec. 4. Participation in the Insolvency Process.

The board recognizes that, along with the commissioner, receiver and the receivership court, the association is a participant in the insolvency process created by the legislature in Arts. 21.28 and 21.28-C, Texas Insurance Code, and as such, shall endeavor to work with the commissioner, receiver and the receivership court to facilitate the effective and efficient administration of receivership estates and to carry out their respective powers and duties in Arts. 21.28 and 21.28-C, Texas Insurance Code.

Sec. 5. Board of Directors.

(a) Composition.

(1) The association is governed by a board of directors composed of nine persons.

(2) The composition of the board shall always be five industry members and four public members.

(3) If at any time during the period of service on the association's board of directors, any member ceases to be eligible to serve pursuant to Sec. 7(a) and (d) of the Act, that member shall immediately vacate his or her position on the board of directors.

(b) Selection.

(1) Industry members

The five industry members shall be elected by the member insurers. Each industry board member may select one nominee for each position to be filled by election. All nominees will appear on the ballot. The ballots will also contain a blank for member insurers to vote for a candidate whose name does not appear on the ballot. Ballots will be sent to the member insurers by the association to be returned by a date certain which shall appear on the ballot. Ballots shall be counted by the association and the name of the person elected will be forwarded to the commissioner by letter for approval.

If the commissioner does not approve a member insurer selected for membership on the board by the member insurers, the member insurers shall select and the board shall submit in writing to the commissioner the name of another member insurer selected to serve on the board as provided above.

(2) The four public members of the board shall be appointed as provided by the Act.

(3) If a vacancy occurs on the board, the members of the board shall elect, by majority vote, a person to fill the vacancy for the unexpired term and shall submit to the commissioner for approval the name of the

person elected. Nominations for public members will be made by the remaining public members and submitted to the board for its approval. Nomination for industry members will be made by the remaining industry members and submitted to the board for its approval. If the commissioner fails to approve a person elected by the board to fill a vacancy, the board shall elect and submit to the commissioner another person to serve as a board member.

(c) Terms of Office.

(1) Each term shall run from the beginning of the calendar year to the end of the sixth calendar year after the beginning of the member's term.

(2) The terms of three members of the board shall expire at the end of each odd-numbered calendar year.

(3) Directors shall be eligible to succeed themselves in office.

(d) Officers.

(1) The board shall elect from its membership a chairperson, a vice-chairperson, and a secretary-treasurer, and such other officers of the board as it deems necessary. At least one officer must be a public member.

(2) The chairperson shall preside at all meetings of the board and perform such other duties as may be prescribed by the board. When the chairperson is absent from a meeting, is unable to act, or refuses to act, the vice-chairperson shall perform the duties of the chairperson.

(3) The term of office for each officer of the board shall be one year, coinciding with the fiscal year of the association. An officer shall continue in office until his or her successor is elected.

(e) General Duties and Authority

The board shall carry out the duties required by the Act and may exercise the powers authorized by the Act. Except as limited by the Act, the board may exercise its powers and carry out its duties through its executive director or other persons designated by the board. The board may take such actions as are necessary to exercise the powers and carry out the duties provided in the Act and in this plan. The executive director or any designee of the board, to the extent authorized by the board, may take such actions as are necessary to exercise the powers and carry out the duties provided in the Act and this plan.

(f) Meetings.

(1) Regular Meetings.

(A) The board shall hold regular meetings at its main office in Travis County, Texas once each calendar quarter on the fourth Friday of the first month of each calendar quarter beginning at 9:00 a.m.; however, the date and time of a regular meeting may be changed upon notice.

(B) At each regular meeting, the board may take any action permitted by law. A quorum shall be required for official action by the board.

(C) All polices of the association related to fulfilling its statutory duties must be approved by the board. For the purpose of this provision, a policy shall mean a general statement of the principles by which the association is guided in the management of its business. Policy shall not include the procedures developed by the association which prescribe the process by which the association fulfills its statutory duties.

(D) All meetings of the Board of Directors shall be conducted in compliance with the open meetings law, Chapter 551, Government Code.

(2) Special Meetings.

Special meetings of the board may be called by the chairperson and shall be called upon request of the commissioner or any two board members with not less than 72 hours oral or written notice to each board member and the commissioner of the place, day and time of the meeting and of the general purpose or purposes for which the special meeting is to be held.

(3) Emergency Meetings.

Emergency meetings of the board may be called by the chairperson and shall be called upon request of the commissioner or any two board members with not less than 4 hours oral notice to each board member and the commissioner of the place, day and time of the meeting and of the reason for the emergency meeting.

(g) Expenses.

(1) Upon approval of the board, members of the board may be reimbursed from the assets of the association for expenses incurred by them as members of the board.

(2) Each member of the board is entitled to receive reimbursement for amounts actually spent in performing duties as a member of the board.

(3) The board shall adopt a form for and procedures to be followed for the reimbursement of expenses.

(4) Before a member of the board is reimbursed for his or her expenses, the member of the board must submit to the executive director a statement of expenses on a form approved by the board.

(5) Members of the board shall not otherwise be compensated by the association for their services.

(h) Audit.

The board will adopt an audit plan annually.

(i) Delegation of authority.

(1) The chairman of the board of directors may create committees or task forces and assign responsibilities to the committee or task force.

(2) The committee or task force may meet outside of a regular meeting of the board to consider the matters assigned to it.

(3) The committee or task force shall report its activities and recommendations to the board at a regular board meeting.

(j) Training.

Each member of the board shall receive training, including but not limited to, overviews of:

(1) the board members' statutory and fiduciary responsibilities;

(2) the association's investment policy;

(3) the Guaranty Act; and,

(4) open meetings.

Sec. 6. Operations.

(a) General.

(1) The official address of the association is the address of the main office of the association in Travis County, Texas.

(2) The fiscal year of the association is the calendar year.

(3) The association shall procure goods and services in accordance with its purchasing policy which shall include provisions for competitive bidding and competitive selection.

(b) Procedures Relating to Claims.

(1) The association shall exercise its powers and discharge its duties pursuant to Section 8 of the Act. Further, the association shall establish a claim filing procedure which includes, but is not limited to, notice by the

association to claimants, procedures for filing claims seeking recovery from the association, and a procedure for appealing the denial of claims by the association.

(2) Upon the commissioner's request, the association shall provide initial notice of impairment to insureds and other interested parties in a format which has been presented to the commissioner for review and comment. The association shall maintain a list of persons notified pursuant to this section.

(3) Acceptable claim forms shall include claims submitted on an accepted form of the impaired insurer prior to impairment or a proof of claim acceptable to the receiver subsequent to the impairment.

(4) Covered claims are considered filed with the association if:

(A) the claim existed in the company's records at the time of impairment;

(B) the claim is filed or received prior to the claim filing deadline applicable to the association, including claims referred by the receiver; or

(C) the claim is timely filed and the claimant follows written procedures established by the association.

(5) In response to the receipt of a claim, the association shall provide the claimant with a statement of the claimant's rights and obligations under the Act including an explanation of the claimant's statutory obligation to exhaust other insurance

accompanied by an "affidavit of other insurance" and the association's procedure for appealing the denial of a claim.

(6) Any denial of a claim, whether in whole or in part, by the association shall be made in writing. The claimant shall be informed of the reason for denial and notified that the denial does not preclude any rights or remedies which may be available to the claimant.

(7) The association shall establish an internal procedure for claimants to appeal the denial of a claim. The appeal shall include review by association management.

(c) Reporting.

(1) The association shall provide all information requested by the receiver or special deputy receiver regarding claims processed by the association.

(2) Upon the closure of an estate, the association shall provide certification of the status of the association's discharge of its duties under the Act relative to that estate.

(d) Assets and Deposits.

(1) The association may open and maintain accounts for funds of the association in one or more banks, savings and loan associations, and other financial institutions and also, may deposit funds into the Texas Treasury Safekeeping Trust Company, Except for the Texas Treasury Safekeeping Trust Company, funds maintained in these financial institutions must be insured by a federal agency that provides for deposit

insurance or must be fully secured with bonds, notes, securities, or other evidences of indebtedness supported by the full faith and credit of the United States or guaranteed as to principal and interest by the United States. If the balance in an association account under the subsection insured by a federal agency exceeds the amount of the federal insurance, the board must enter into an agreement with the financial institution requiring security as described in this subdivision that is equivalent to the amount that exceeds the maximum amount insured.

(2) Funds of the association may be invested and reinvested by the board or its authorized representative in any manner approved by the board in its investment policy.

(3) The association may delegate deposit and withdrawal authority relating to its accounts to specified officers and employees and shall require those officers and employees to be covered by appropriate bonds. Money may be withdrawn from any of the association accounts, provided that signatures of at least two persons authorized by the board shall be required on any withdrawals and transfers to accounts other than those of the association.

(4) All assets of the association deposited in accounts under Subdivision (1) of this subsection shall be deposited in the name of the association and all other assets of the association must be owned or held in the

name of the association. An up-to-date, current inventory of the assets of the association, describing the type and location of assets, shall be kept as a part of the financial records of the association, properly accounting for the cost or value of the assets and their depreciation, if any. The board may establish any additional procedures consistent with the Act for the handling of any assets of the association.

(5) A record shall be maintained at the main office of the association of all assets and deposits of the association and all financial transactions of the association, its agents, and the board relating to the association. Documentation relating to all such assets, deposits, and transactions shall be made and maintained by the association in accordance with generally accepted accounting standards.

(e) Assessments.

(1) Purpose of Assessments.

(A) The association shall assess member insurers for amounts necessary to pay:

(i) the obligations of the association under Section 8(a) of the Act;

(ii) the expenses of handling covered claims;

(iii) administrative expenses as authorized by the Act; and

(iv) other expenses as authorized by the Act.

(B) Assessments shall be determined pursuant to an assessment policy adopted by the board. A copy of the association's assessment policy shall be provided to association members at their request.

(2) Collection of Assessments.

The association shall calculate and collect assessments from its member insurers pursuant to the Act. The association shall report to the commissioner any delinquencies in the payment of assessments by any member insurers.

(3) Special authority to assess.

In the event of a natural disaster or other catastrophic event which creates substantial covered claim liability for the association, the board shall authorize the chairman to contact the commissioner of insurance to review the association's ability to meet its liability obligations under the Act.

If the chairman and the commissioner determine by this review that the association is in need of funds beyond its ability to assess member insurers, the chairman and the commissioner of insurance shall make application to the governor in accordance with the Act for the authority to assess an additional 2% in the other lines category.

This authority to assess is limited to the year in which it is granted. If additional funds are required to discharge the association's statutory obligations resulting from the natural disaster or catastrophic event in the following year, the chairman and the

commissioner of insurance will be required to seek additional authority from the governor in the above described manner.

(f) Borrowing Funds.

(1) On a majority vote of the members of the board, the board may authorize the chairperson or another designated member of the board to borrow funds necessary to carry out the powers and duties of the association.

(2) At the time the board authorizes the chairperson or other member of the board to borrow funds on behalf of the association, the board shall establish the terms and conditions under which the chairperson or the other designated member of the board will borrow the funds.

(3) The chairperson, or other person designated by the board to borrow funds on behalf of the association shall report to the board regarding borrowed funds at its next regular meeting following completion of the loan transaction, unless required to report at an earlier time. The association shall maintain detailed written records relating to all borrowed funds.

Sec. 7. Indemnification

Indemnification Against Liability.

The association shall indemnify designated officials pursuant to an indemnification policy adopted by the board.

/s/ G. Ron Nichols
G. Ron Nichols
Chairman,
Board of Directors

APPROVED:

/s/ Elton Bomer
Commissioner of Insurance

Supreme Court, U.S.
FILED
JUN 9 - 2000
CLERK

(2)

No. 99-1788

In The

Supreme Court of the United States

PFIZER INC,

Petitioner,

vs.

TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should overrule *Carden v. Arkoma Associates* and adopt a different rule that requires federal courts to engage in a feature-by-feature comparison of non-corporate entities to determine whether those entities should be treated as corporations for purposes of diversity of citizenship jurisdiction.

2. Whether the Texas Property and Casualty Insurance Guaranty Association should be treated as a corporation or as an unincorporated association for purposes of diversity of citizenship jurisdiction, if the Court overrules *Carden v. Arkoma Associates.*

The Texas Property and Casualty Insurance Guaranty Association does not agree that Questions 4 and 5 in Pfizer's Petition for Writ of Certiorari are properly presented, since any resolution of the questions above would make Question 4 and 5 moot.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT AND AUTHORITIES 4

CONCLUSION 19

PRAYER 20

TABLE OF AUTHORITIES

Page

CASES

Carden v. Arkoma Associates, 494 U.S. 185 (1990) ..... *passim*

Chapman v. Barney, 129 U.S. 677 (1889) ..... *passim*

Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900) 9, 10, 12

International Insurance Co. v. Virginia Ins. Guaranty Assn., 649 F.Supp. 58 (E.D. Va. 1986) 6

Iowa Ins. Guaranty Assn. v. New England Ins. Co., 701 F.Supp. 177 (S.D. Iowa 1988) 5

Navarro Savings Assn. v. Lee, 446 U.S. 458 (1980) .. 7, 8, 12

Newport Limited v. Sears, Roebuck & Co., 941 F.2d 302 (5th Cir. 1991) 6

Office of Public Insurance Counsel v. Texas Automobile Insurance Plan, 860 S.W.2d 231 (Tex. App. – Austin 1993) 15

Puerto Rico v. Russell & Co., 288 U.S. 476 (1933) 5, 7, 9, 11

Rhulen Agency v. Alabama Insurance Guaranty Association, 896 F.2d 674 (2nd Cir. 1990) 5

Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965) ..... *passim*

Temple Drilling Co. v. Louisiana Insurance Guaranty Association, 946 F.2d 390 (5th Cir. 1991) 2, 5

Texas Catastrophe Property Insurance Association v. Morales, 975 F.2d 1178 (5th Cir. 1992), *cert. denied*, 507 U.S. 1018 (1993) 16

Trombino v. Transit Cas. Co., 110 F.R.D. 139 (D.R.I. 1986) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. §1332 ..... 1, 11, 19

Texas Insurance Code art. 1.14-1 16

Texas Insurance Code art. 21.28-C 14, 15, 16

Texas Insurance Code art. 21.49 17

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Texas Property and Casualty Insurance Guaranty Association (the "TPCIGA") submits the following Brief in Opposition to Pfizer, Inc.'s ("Pfizer") Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case involves Pfizer, Inc.'s appeal from the Fifth Circuit Court of Appeals' order affirming the order of the trial court dismissing this case for want of subject matter jurisdiction. It is undisputed that Pfizer, Inc. is a citizen of New York, its principal place of business, and Delaware, its state of incorporation. Similarly, it is undisputed that the TPCIGA is an unincorporated association with its principal place of business in Texas, and that one or more of the TPCIGA's member insurers is a citizen of New York.

The Court of Appeals correctly affirmed the trial court's holding that because the TPCIGA is an unincorporated association, its citizenship for purposes of determining whether diversity jurisdiction exists is in any state where its members are citizens. Since both Pfizer and one or more of the TPCIGA's member insurers are citizens of New York, the Court of Appeals correctly affirmed the trial court, which found that subject matter jurisdiction did not exist under 28 U.S.C. §1332 because there is no diversity of citizenship between the parties.

SUMMARY OF THE ARGUMENT

Under *Carden v. Arkoma Associates*, 494 U.S. 185, 197 (1990), and the precedents it follows, this Court has consistently held that the citizenship of non-corporate entities must be determined by looking to the citizenship of their members or partners, and that such entities cannot be assimilated to the status of a corporation by engaging in a detailed analysis of their specific characteristics. The Fifth Circuit correctly applied the bright line rule established in *Carden* to insurance guaranty associations in this case. It had previously determined the identical issues presented in this case in *Temple Drilling Co. v. Louisiana Insurance Guaranty Association*, 946 F.2d 390, 393-394 (5th Cir. 1991). Every other federal court that has considered the question of whether insurance guaranty associations created by statute as unincorporated associations should be treated as corporations for purposes of diversity of citizenship jurisdiction has held that guaranty associations should be treated as unincorporated associations.

Although Pfizer asserts that *Carden* does not clearly establish a bright line test which distinguishes between corporations and non-corporate legal entities, this is clearly the holding of *Carden* and the precedents it followed. Pfizer does not cite a single federal case in which *Carden* was read to allow federal courts to engage in a fact-specific inquiry to determine whether a particular non-corporate legal entity should be treated as a corporation for diversity purposes. Therefore, Pfizer is effectively requesting that this Court overrule *Carden*.

This Court should not overrule *Carden*, since Congress has enacted legislation giving special treatment to

corporations in determining citizenship for purposes of diversity jurisdiction, and the Court correctly determined that it should defer to Congress on this issue. Additionally, the Court in *Carden* correctly observed that engaging in a fact-specific inquiry at the outset of litigation to establish whether subject matter jurisdiction exists would result in the consumption of scarce judicial resources and raise the cost of litigation to all parties.

Pfizer's assertions that the TPCIGA is effectively an agency of the State of Texas, and that its operations are managed and controlled by the Commissioner of Insurance, are not supported either by the TPCIGA's enabling statute or by Texas case law involving similar statutorily-created associations of insurers.

Additionally, even if this Court were to abandon *Carden*, and were to engage in a "real party in interest" analysis as urged by Pfizer to determine the extent to which the members of the TPCIGA have control over the affairs of the TPCIGA or have a financial stake in litigation involving the TPCIGA, the TPCIGA should not be treated as a corporation for diversity jurisdiction purposes. The TPCIGA is governed by a board of directors, and its member insurers select a majority of the board of directors. In addition, the TPCIGA's member insurers have a direct and significant financial stake in the outcome of litigation involving the TPCIGA. Unlike a limited partner, the TPCIGA's member insurers are required to pay assessments as necessary for the TPCIGA to discharge its statutory obligations, and there is no fixed limit on the amount which may be assessed. Therefore, under a "real party in interest" analysis, the financial stake of member insurers in the TPCIGA is much more like that of

a general partner than of a limited partner or a corporate shareholder.

Finally, the Texas Legislature did not infringe on any constitutional right held by Pfizer when it created the TPCIGA as an unincorporated association instead of creating it as a corporation. There is simply no constitutional or other legal right to have non-corporate entities treated as corporations for purposes of determining diversity of citizenship jurisdiction.

ARGUMENT AND AUTHORITIES

Pfizer is asking the Court to overrule *Carden*, not to clarify it.

In its Petition for Writ of Certiorari, Pfizer ostensibly asks this Court to "clarify" that *Carden v. Arkoma Associates*, 494 U.S. 185 (1990) did not establish a "bright line" rule which precludes federal courts from considering whether non-corporate legal entities should be treated as corporations for purposes of determining whether diversity of citizenship exists. Pfizer's real problem is not that *Carden* lacks clarity, but instead that *Carden* and the precedents it follows, such as *Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965) speak with unmistakable clarity.

In *Carden*, this Court clearly stated that its prior decision in *Bouligny*, as well as the line of precedents dating back to *Chapman v. Barney*, 129 U.S. 677 (1889), preclude federal courts from engaging in a feature-by-feature comparison of non-corporate entities to corporations to determine whether they should be treated as

corporations or partnerships for diversity of citizenship purposes:

> There could be no doubt, after *Bouligny*, that at least common-law entities (and likely all entities beyond the Puerto Rican sociedad en comandita) would be treated for purposes of the diversity statute to what *Russell* called the " 'tradition of the common law,' which is to treat as legal persons only incorporated groups and to assimilate all others to partnerships."

Carden, 494 U.S. at 190 (quoting *Russell*, 288 U.S. at 480).

Indeed, every federal court which has considered this issue in the context of insurance guaranty associations has followed the bright line rule established in *Carden* and *Bouligny*, and have held that for purposes of diversity jurisdiction, insurance guaranty associations are citizens of every state where their member insurers are citizens.[1] *Temple Drilling Co. v. Louisiana Ins. Guaranty Assn.*, 946 F.2d 390, 393-94 (5th Cir. 1991); *Rhulen Agency v. Alabama Ins. Guaranty Assn.*, 896 F.2d 674 (2nd Cir. 1990); *Iowa Insurance Guaranty Association v. New England*

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[1] As the Court noted in *Rhulen*, insurance guaranty associations in most states are created by statute as unincorporated associations. This is because most state legislatures have enacted statutes that follow the NAIC Post-Assessment Property and Liability Insurance Guaranty Association Model Act. Therefore, if this Court were to hold that the Texas Guaranty Act is unconstitutional, as Pfizer urges, the Court's ruling would call into question the validity of the vast majority of guaranty association laws enacted by states throughout the nation.

Ins. Co., 701 F. Supp. 177, 178-79 (S.D. Iowa 1988); *International Insurance Co. v. Virginia Insurance Guaranty Assn.*, 649 F.Supp. 58, 61 (E.D. Va. 1986); *Trombino v. Transit Cas. Co.*, 110 F.R.D. 139, 144 (D.R.I. 1986).

Significantly, Pfizer fails to cite a single instance in which any federal court at the Court of Appeals or District Court level has failed to understand the clear rules set forth in *Carden* and the precedents it follows. Nor does Pfizer point to any language of the *Carden* opinion that has or could even possibly create confusion or ambiguity about its effect. Indeed, Pfizer cannot point to any federal court that has adopted its tortured reading of *Carden*. In fact, Pfizer does not mention any court that has even suggested that *Carden* and *Bouligny* leave any room for the sort of characteristic-by-characteristic comparison of business entities they condemn.

For instance, this Court's holding in *Carden* is clearly understood by the Fifth Circuit, the Court of Appeals from which both this case and *Carden* were brought to this Court. In *Newport Limited v. Sears, Roebuck & Co.*, 941 F.2d 302 (5th Cir. 1991), the Fifth Circuit stated that the sort of "real party in interest" analysis of the members or partners of non-corporate entities advocated by Pfizer is simply not permitted under *Carden*:

> In its brief, Sears painstakingly points out the parallel, but not precisely identical, civil law origins of the Puerto Rican *sociedad en comandita* and the Louisiana partnership *in commendam*. In so doing, Sears misperceives the teaching of *Carden*, which essentially forecloses the characteristic-by-characteristic inquiry which Sears would have us undertake today . . . The Court

> [in *Carden*] suggested that any change in the jurisdictional treatment accorded these entities should be addressed to the Congress and not the courts . . . We find little support for the suggestion that the Supreme Court intended an exception for any entity other than a *sociedad en comandita*, especially for one which on its face is indistinguishable from an ordinary limited partnership.

Id. at 305-07.

Therefore, while Pfizer attempts to disguise the substance of its request to this Court as "clarification," Pfizer is effectively asking this Court to overrule *Carden* and the extensive line of precedents it follows, not to clarify them. This would confuse rather than clarify the law in this area. In addition, for the reasons discussed below, there are no sound legal or policy reasons why the Court should accept Pfizer's invitation to revisit the issues this Court has settled in *Carden* and *Bouligny*.

The applicable case precedents do not support Pfizer's legal arguments.

The legal arguments Pfizer asserts in support of its Petition for Writ of Certiorari are not supported by the applicable case law. For instance, Pfizer claims to have found exceptions to the bright line rule which precludes federal courts from treating non-corporate entities as corporations in *Navarro Savings Association v. Lee*, 446 U.S. 458 (1980) and *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933). Pfizer's Petition at 7-8. The same arguments were considered and rejected by the Court in *Carden*.

In *Carden*, it was argued that *Navarro Savings* was authority for the proposition that federal courts should engage in a "real party in interest" analysis to determine whether a non-corporate legal entity should be considered to be a citizen where its members are citizens, or whether it should be treated as a corporation. Pfizer has advanced the same argument in this case. However, in *Carden*, this Court made it clear that the "real party in interest" analysis of *Navarro Savings* is not applicable to the question of whether non-corporate entities may be treated as corporations for purposes of diversity of citizenship jurisdiction, and that its application by analogy was wholly unpersuasive:

> Arkoma claims to have found another exception to our *Chapman* tradition in *Navarro Savings Assn. v. Lee* [citation omitted]. That case, however, did not involve the question whether a party that is an artificial entity other than a corporation can be considered a "citizen" of a State, but the quite separate question whether parties that were undoubtedly "citizens" (viz., natural persons) were the real parties to the controversy . . . *Navarro*, in short, has nothing to do with the *Chapman* question, except that it makes available to respondent the argument that by analogy that, just as business reality is taken into account for purposes of determining whether a trustee is the real party to the controversy, so also should it be taken into account for purposes of determining whether an artificial entity is a citizen. That argument is, to put it mildly, less than compelling.

Carden, supra, at 494 U.S. 191-92.

In contrast, the Court in *Carden* acknowledged that *Puerto Rico v. Russell* was in fact an exception to the line of precedents beginning with *Chapman v. Barney*. However, it also noted that the approach used in *Russell* "was proposed and specifically rejected in *Bouligny*." *Carden, supra*, at 190. Therefore, while *Russell* can fairly be read as an exception to the rule established by the line of cases following *Chapman v. Barney*, the Court's discussion in *Carden* indicates that *Russell* is a case involving a unique business entity organized under a Spanish civil law tradition, and that its application is likely limited to its facts. *Id.*

Pfizer also incorrectly describes *Chapman v. Barney*, 129 U.S. 677 (1889), *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900), and *Steelworkers v. R. H. Bouligny, supra*, as cases in which the Court engaged an analysis of the business entities in question and "found that the organization under investigation did not have citizenship distinct from its members." Pfizer's Petition at 9. Contrary to Pfizer's argument, none of those cases involved a detailed analysis of the extent to which the members of the non-corporate business entities in question controlled the governance and operations of the organizations in question. Instead, all of these cases specifically applied the bright line rule followed in *Carden*. For instance, in *Chapman*, the Court applied the clear distinction made by Congress between the citizenship of corporations and non-corporate entities. The Court in *Chapman* held that because the joint-stock association was a partnership, and not a corporation, diversity jurisdiction must be based on the citizenship of the members of the joint-stock association:

> But the express company cannot be a citizen of New York within the meaning of the statutes regulating jurisdiction unless it be a corporation. The allegation is that the company is not a corporation, but a joint-stock company – that is, a mere partnership.

Chapman, supra, 129 U.S. 682.

Similarly, the Court in *Great Southern* noted that while the "limited partnership association" in question had "some of the characteristics of a corporation," Courts were precluded from extending that rule to non-corporate entities. *Great Southern, supra,* at 457. The Court in *Bouligny* followed *Chapman* and *Great Southern* in declining to engage in a detailed analysis of the characteristics of a labor union in order to determine whether a labor union should be treated as a corporation for diversity purposes. Instead, the Court in *Bouligny* deferred to the statutory distinction that had been made between corporations and non-corporate entities by Congress:

> Whether unincorporated labor unions ought to be assimilated to the status of corporations for diversity purposes, how such citizenship is to be determined, and what if any related rules ought to apply, are decisions which we believe suited to the legislative and not the judicial branch, regardless of our views as to the intrinsic merits of petitioner's argument . . .

Bouligny, 382 U.S. at 153.

In summary, *Carden* and the line of precedents it follows make it clear that for non-corporate entities such as the TPCIGA, the citizenship of the TPCIGA must be

determined by reference to the citizenship of its members. Pfizer fails to identify any case precedent other than *Russell* that would fairly support any other result, and the approach used in *Russell* was clearly rejected in *Bouligny* and *Carden*. Accordingly, both the trial court and the Fifth Circuit correctly applied the applicable law as announced by this Court. This Court does not need to revisit these issues in this case, and it should decline Pfizer's invitation to reconsider its well-settled and clear precedents on this issue.

There are important policy reasons for continued adherence to the bright line test set forth in *Carden*.

Pfizer fails to acknowledge, let alone address, the legitimate public policy reasons advanced by the Court in *Carden* for its continuing adherence to the bright line rules established in *Chapman* and *Bouligny*. First, the *Carden* Court recognized that engaging in a case-by-case analysis of the nature of various sorts of non-corporate legal entities does not afford appropriate judicial deference to the legislative power of Congress. The Court in *Carden* was not unaware of the arguments in favor of applying a flexible and fact-specific approach to the analysis of whether modern non-corporate business entities should be treated as corporations for diversity purposes. Nevertheless, it elected to honor "the more important policy of leaving that [decision] to the people's elected representatives." *Carden, supra,* at 197.

In 28 U.S.C. §1332(c)(1), Congress provided for purposes of diversity of citizenship jurisdiction, "a corporation shall be deemed to be a citizen of any State by which

it has been incorporated and of the state where it has its principal place of business . . . " The Court in *Carden* noted that Congress amended the diversity jurisdiction statute in 1958, and was undoubtedly aware at that time that a wide variety of non-corporate entities existed, but nevertheless did not make any provision for treating non-corporate entities as corporations:

> No provision was made for the treatment of artificial entities other than corporations, although the existence of many new, post-*Letson* forms of commercial enterprises, including at least the sort of joint stock company at issue in *Chapman*, the sort of limited partnership association at issue in *Great Southern*, and the sort of Massachusetts business trust at issue in *Navarro*, must have been obvious.

Carden, supra, at 196-97.

Therefore, while the diversity statute clearly provides special treatment to corporations, it just as clearly does *not* provide such treatment to non-corporate legal entities. In its Petition for Writ of Certiorari, Pfizer does not address the effect of the diversity statute or make any argument, principled or otherwise, that Congress intended the statute to apply to legal entities other than corporations. To the contrary, Pfizer fails to address in any manner the legitimate separation of powers issues which would be raised if this Court abandoned its traditional deference to Congress in this area, and instead (as Pfizer requests) judicially expanded the scope of federal diversity jurisdiction beyond what is allowed under the plain language of the diversity statute.

The *Carden* Court also noted if federal courts were required to engage in a fact-intensive inquiry to determine whether a particular non-corporate entity should be treated as a corporation for diversity of citizenship purposes, such a procedure would impose substantial burden upon both courts and litigants. In this regard, the Court in *Carden* recognized that fact-intensive disputes about the degree of control exercised over a non-corporate organization by its members will undoubtedly raise "questions whose complexity is particularly unwelcome at the threshold stage of determining whether a court has jurisdiction." *Id.* While Pfizer argues that such a procedure should be permitted, it wholly ignores the costs such a procedure would impose, both in terms of judicial time and resources and increased costs to parties involved in litigation.

The Court in *Carden* determined that these important policy considerations override the competing policy considerations raised by previous parties who have argued, as Pfizer does, that the bright line rule in *Carden* should be abandoned. Pfizer does not furnish the Court with any reasons why it should reconsider this decision.

Even if the Court were to abandon the bright line rule followed in *Carden*, the Texas Property and Casualty Insurance Guaranty Association should not be treated as a corporation, since its members have significant control over its management, and since its members' liability for assessments has no maximum limit.

In its Petition for Writ of Certiorari, Pfizer makes numerous misrepresentations to the effect that the TPCIGA is directly controlled by the Commissioner of

Insurance and is effectively a state agency. For instance, Pfizer states, *inter alia*, that the TPCIGA:

1) "is a quasi-governmental agency controlled by the State of Texas" (Pfizer's Petition at 3);

2) "was created by the Texas Legislature to perform a public function, namely regulation of Texas Admitted Carriers" (Pfizer's Petition at 5);

3) "is regulated by the State of Texas, and is directly administered by the Texas Insurance Commissioner, an official of the State of Texas" (Pfizer's Petition at 5-6);

4) " 'members' of the TPCIGA "have no control over the Fund's assets, business or involvement in litigation" and that "these functions are carried out by the Texas Attorney General and the Insurance Commissioner – officials of the State of Texas" (Pfizer's Petition at 9); and

5) "All funds collected by the Texas Fund must be deposited with the Texas Treasury Safekeeping Trust Company" (Pfizer's Petition at 11).

While the TPCIGA is clearly created by statute, Pfizer's assertions about the nature of the TPCIGA are materially incorrect and are not consistent with the language of Texas Insurance Code art. 21.28-C, the enabling statute which governs the TPCIGA. While Pfizer's incorrect assertions are not germane unless this Court abandons *Carden* and the line of precedents beginning with *Chapman*, the TPCIGA is compelled to respond to the inaccuracies set forth in Pfizer's Petition for Writ of Certiorari.

First, the TPCIGA is not a state agency, nor is it directly administered by the Commissioner of Insurance.[2] Instead, the TPCIGA is governed by a board of directors. A majority of the board of directors are selected by the TPCIGA's member insurers. Texas Insurance Code art. 21.28-C, §§6-7.

While the Commissioner of Insurance undoubtedly exercises oversight over the TPCIGA's operations, the Commissioner's oversight does not allow the Commissioner to directly govern the operations of the TPCIGA. Texas Insurance Code art. 21.28-C, §6 clearly states that "The Association shall perform its functions under a plan of operation approved under Section 9 of this Act and shall exercise its powers through the board of directors." In *Office of Public Insurance Counsel v. Texas Automobile Insurance Plan*, 860 S.W.2d 231, 236 (Tex. App. – Austin 1993), the Court held that an order entered by the State Board of Insurance (The State Board of Insurance has since been eliminated, and the Commissioner of Insurance is now the executive authority over the Texas Department of Insurance) was illegal because "TAIP, not the Board, is the agency vested with power to govern the assigned risk plan and is subject only to the Board's oversight." Like the TAIP, the TPCIGA is a statutorily created organization of private insurers, and it is governed by its own board of directors. *OPIC v. TAIP* indicates that a state agency's "oversight" of an entity created

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[2] If the TPCIGA were in fact an agency of the State of Texas, as Pfizer suggests, the Eleventh Amendment would probably preclude federal courts from asserting jurisdiction over Pfizer's claims against the TPCIGA.

by statute and composed of private businesses cannot override statutory provisions that empower the governing board of the entity to generally manage and control its operations.

In some cases, Pfizer's assertions simply ignore the plain language of the TPCIGA's enabling statute. For instance, Pfizer asserts that "All funds collected by [the TPCIGA] must be deposited with the Texas Treasury Safekeeping Trust Company. Pfizer's Petition at 11. Contrary to Pfizer's mischaracterization, the statute cited by Pfizer is permissive, not mandatory, and clearly states that the TPCIGA's board of directors "*may* deposit all money collected by the association into the Texas Treasury Safekeeping Trust Company . . . " Texas Insurance Code art. 21.28-C, §8(j). In fact, the TPCIGA maintains its funds in accounts with banks and investment managers. Similarly, contrary to Pfizer's incorrect description of the TPCIGA as a mere "fund of money," the TPCIGA is empowered to engage in a wide variety of activities as necessary to handle and pay covered claims. Texas Insurance Code art. 21.28-C, §8. However, those powers do not allow the TPCIGA to regulate admitted insurance carriers in Texas, as Pfizer indicates. Instead, the Commissioner of Insurance regulates the insurance business in Texas, not the TPCIGA. Texas Insurance Code art. 1.14-1.

In *Texas Catastrophe Property Insurance Association v. Morales*, 975 F.2d 1178 (5th Cir. 1992), *cert. denied*, 507 U.S. 1018 (1993), the Attorney General unsuccessfully argued that a statutorily-created association of insurers similar to the TPCIGA was a state agency. Like the TPCIGA, property insurers must be members of the "Catpool" as a condition of being a licensed property insurer in Texas.

Texas Insurance Code art. 21.49, §4. Also like the TPCIGA, the "Catpool" also operates under a plan of operation that must be approved by the Commissioner of Insurance. Texas Insurance Code art. 21.49, §5(c). The member insurers of the "Catpool" are subject to assessments to pay claims, just as the member insurers of the TPCIGA are subject to assessments to pay claims. Texas Insurance Code art. 21.49, §19. Despite these facts, the Fifth Circuit held that the "Catpool" was not an agency of the State of Texas, because its funds were separate from those of the State of Texas.

Like the "Catpool," the finances of the TPCIGA are separate from those of the State of Texas. Texas Insurance Code art. 21.28-C, §8(c) provides that "the association shall assess insurers amounts necessary to pay the obligations of the association under Subsection (a) of this section after an insolvency, the expenses of handling covered claims subsequent to an insolvency, and other expenses authorized under this Act." *See also* Texas Insurance Code art. 21.28-C, §18(a) and (b). Therefore, every additional dollar paid in claims is an additional dollar that must be collected from TPCIGA member insurers by way of assessments. If the TPCIGA collects assessments in a particular line of insurance which turn out to be in excess of the amount needed to handle and pay covered claims, the excess funds do not escheat to the State of Texas, but are instead refunded to the TPCIGA's members in proportion to each member's contribution to the prior assessments. Texas Insurance Code art. 21.28-C, §20(c). These provisions make it clear that the TPCIGA's funds are not state funds, and that the TPCIGA is not a state agency.

Pfizer also incorrectly asserts that the TPCIGA "has no real members," and that its members have no real financial stake in its operations. In fact, the member insurers of the TPCIGA have a much more direct and significant financial stake in the outcome of any litigation brought against the TPCIGA than a corporate shareholder or a limited partner of a partnership. Under the statutes described above, the members of the TPCIGA are required to pay assessments as necessary to pay the statutory obligations of the TPCIGA. In contrast, neither a shareholder of a corporation nor a limited partner of a partnership is liable to creditors of the corporation or partnership in the event that the corporation or partnership assets and income are not sufficient to pay the financial obligations of that business entity. Unlike a member insurer of the TPCIGA, a corporate shareholder or limited partner can only lose as much as they have invested in the business. Therefore, even if this Court were to depart from its own precedents and engage in the sort of detailed analysis which is expressly prohibited under *Carden*, the Court would find that the members of the TPCIGA have a much greater financial stake in the TPCIGA's operations than a corporate shareholder or a limited partner of a limited partnership.

The Texas Legislature did not infringe on any constitutional right by creating the TPCIGA as an unincorporated association rather than as a corporation.

Pfizer argues that the Texas Legislature illegally interfered with the assertion of federal jurisdiction by creating the TPCIGA as an unincorporated association rather than as a corporation. This argument is entirely

circular, since *Carden* and the case law precedents it followed make it clear that there is no legal right, let alone any constitutional right, to treat non-corporate entities as corporations for purposes of determining diversity jurisdiction. Congress enacted 28 U.S.C. §1332(c)(1) to apply only to corporations. That statute, as interpreted by the Court in *Bouligny* and *Carden*, precludes federal courts from affording corporate treatment to non-corporate entities.

Therefore, this Court has made it clear that Pfizer's complaint is not properly directed to this Court, to the Texas Legislature, but instead to Congress. Congress clearly could have chosen to expand diversity jurisdiction by amending this statute to allow such treatment to be afforded to non-corporate entities. As discussed in *Carden*, Congress has not chosen to do so, despite the fact that Congress is undoubtedly aware that States have enacted laws which both create non-corporate legal entities, and which allow private persons to create such entities. Pfizer's arguments to the effect that such laws impermissibly infringe on the jurisdiction of federal courts must fail, because they disregard the limits of federal diversity jurisdiction as provided by Congress in 28 U.S.C. §1332(c)(1).

CONCLUSION

This Court should continue to defer to Congress, and to follow the bright line rule set forth in *Carden v. Arkoma Associates*.

PRAYER

The Texas Property and Casualty Insurance Guaranty Association respectfully requests that Pfizer's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE INTERNATIONAL POLICYHOLDERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Petitioner,

v.

TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL POLICYHOLDERS ASSOCIATION

The International Policyholders Association ("IPA") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of Petitioner Pfizer Inc ("Pfizer"). The consent of Respondent's attorney was requested but refused.

INTEREST OF THE *AMICUS CURIAE*

The IPA is an organization composed of twenty member companies in the pharmaceutical, medical device, petroleum products, gas and electric, building materials, chemical and railroad industries. The IPA represents its members in their

capacities as policyholders, and protects their interests in matters relating to insurer insolvencies in the United States and abroad.

The issues raised by the Petition affect not only Pfizer, but also other corporate policyholders which likewise find the federal courts closed to them when they litigate with state insurance guaranty funds. The IPA has a substantial interest in preventing a state guaranty fund from evading a federal forum as Respondent Texas Property and Casualty Insurance Guaranty Association ("Texas Fund") did here. The brief the IPA requests permission to file places the questions raised by the Petition in the important context in which they arise: the nationwide epidemic of insurer insolvencies, the creation by every state of a guaranty fund like the Texas Fund in order to deal with the rash of insolvencies, and the litigation between corporate policyholders and these funds that inevitably followed.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	2
I. THE PETITION POSES AN IMPORTANT QUESTION OF FEDERAL JURISDICTION OVER STATE GUARANTY FUNDS.	2
A. The Wave of Insurer Insolvencies	2
B. The Creation of State Guaranty Funds	4
C. Policyholder Litigation with State Guaranty Funds	6
II. A STATE GUARANTY FUND, LIKE A CORPORATION, SHOULD BE DEEMED A CITIZEN OF THE STATE THAT CREATED IT.	7
A. As in *Navarro*, Member Insurers Are Not Parties in Interest to Policyholder Suits Against Guaranty Associations.	9
B. As in *Russell*, Guaranty Associations Are Creatures of State Law.	10
C. The Concerns Raised in *Bouligny* Are Not Present Here.	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Armstrong World Indus. v. Aetna Cas. & Sur. Co., 52 Cal. Rptr. 2d 690 (Cal. Ct. App. 1996) 3
Carden v. Arkoma Associates, 494 U.S. 185 (1990) 8
Georgia Insurers Insolvency Pool v. Brewer, 602 So. 2d 1264 (Fla. 1992) 7
Navarro Savings Ass'n v. Lee, 446 U.S. 458 (1980) 8, 9
Ortiz v. Fibreboard Corp., 119 S. Ct. 2295 (1999) 2-3
Pennsylvania Life & Health Ins. Guar. Ass'n v. Superior Court, 27 Cal. Rptr. 2d 507 (Cal. Ct. App. 1994) 7
Puerto Rico v. Russell & Co., 288 U.S. 476 (1933) 10
Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n, 896 F.2d 674 (2d Cir. 1990) 7
Temple Drilling Co. v. Louisiana Ins. Guar. Ass'n, 946 F.2d 390 (5th Cir. 1991) 7
Texas Property & Cas. Ins. Guar. Ass'n v. Boy Scouts of Am., 947 S.W.2d 682 (Tex. Ct. App. 1997, no writ) 7
United Steelworkers of America v. R. H. Bouligny, Inc., 382 U.S. 145 (1965) 10, 11

STATUTES

11 U.S.C. §§ 701-706 (1998) 3
15 U.S.C. §§ 1011-1015 (1998) 3
TEX. INS. CODE ANN. art. 21.28-C (West 1981 & Supp. 1999) .....
§ 6 5
§ 8 10

TABLE OF AUTHORITIES—Continued

Page

§ 8(a) 6
§ 8(b) 7
§ 8(c) 5, 9
§ 8(h)(3) 7

MISCELLANEOUS

Insurance Information Institute, Inc., *Insolvencies/Guaranty Funds*, INS. ISSUES UPDATE (Ruth Gastel ed., Feb. 2000) 6

Ronald Gift Mullins, *Insurance Industry Still Strong Despite 35 Insolvencies in 1999*, J. COM. 10 (May 15, 2000) 4

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, POST-ASSESSMENT PROPERTY AND LIABILITY INSURANCE GUARANTY ASSOCIATION MODEL ACT (1996)

§ 5(F)(1), (2) 5
§ 5(H)(2) 9
§ 6 ..... 5, 6
§ 8(A)(1) 6, 10
§ 8(A)(2) 5, 10
§ 8(A)(3) 9, 10
§ 8(A)(4) 4, 10
§ 8(B)(3) 7, 10

REFERENCE HANDBOOK ON INSURANCE COMPANY INSOLVENCY (ABA Tort & Ins. Prac. Sec., 3d ed. 1993) 4, 11

STAFF OF THE HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON ENERGY AND COMMERCE, 101ST CONG., FAILED PROMISES: INSURANCE COMPANY INSOLVENCIES (Comm. Print 101-P 1990) 2

TABLE OF AUTHORITIES—Continued

Page

Paul Sugarman, *Insolvent Carriers and State Insurance Guaranty Funds*, presented at The Environmental Law Institute, May 17-18, 1990..... 6

TEX. PROPERTY & CAS. INS. GUAR. ASS'N PLAN OF OPERATION § 3(a)..... 5

IN THE

Supreme Court of the United States

NO. 99-1788

PFIZER INC,

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BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL POLICYHOLDERS ASSOCIATION IN SUPPORT OF PETITIONER

This brief *amicus curiae* is filed contingent upon the grant of the foregoing motion for leave to file the brief. The interest of the International Policyholders Association ("IPA") in this case is set forth in that motion.[1]

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[1] In accordance with Rule 37.6 of the Rules of this Court, the IPA states that its counsel authored this brief in whole, and that no person or entity, other than the IPA, its members or its counsel, made a monetary contribution to the preparation or submission of the brief.

ARGUMENT

I. THE PETITION POSES AN IMPORTANT QUESTION OF FEDERAL JURISDICTION OVER STATE GUARANTY FUNDS.

The significance of this case can best be understood in the context in which it arises: the rise in insurer insolvencies in the last two decades, the resultant creation of state guaranty funds and the consequent litigation between policyholders and the funds. We provide that context below.

A. The Wave of Insurer Insolvencies

The late 1980s and early 1990s witnessed a dramatic increase in insurer insolvencies in the United States. Many of these insolvents were companies that had insured major commercial risks. STAFF OF THE HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON ENERGY AND COMMERCE, 101ST CONG., FAILED PROMISES: INSURANCE COMPANY INSOLVENCIES 2 (Comm. Print 101-P 1990). When these insurers became insolvent, their affairs were wound up by liquidating their assets and paying claims (including policyholder claims) to the extent the liquidated assets allowed. The effects of these insolvencies continue to be felt by corporate policyholders that now find themselves with significant amounts of coverage issued by insolvent insurers.

The causes of the spate of insolvencies were many, but prominent among them was an escalating number of potential "long-tail" liabilities faced by corporate policyholders and their liability insurers. An explosion in asbestos, other toxic tort and environmental cleanup claims against corporations began in the late 1970s and has yet to abate. Private tort claims and governmental cleanup orders continue to be filed many years after a product's manufacture, sale, use or disposal. *See, e.g., Ortiz v. Fibreboard Corp.*, 119 S. Ct.

2295, 2302 & n.1 (1999) (noting the "elephantine mass of asbestos cases" that have plagued state and federal courts).

An overwhelming majority of courts have held that corporate policyholders can obtain coverage for such claims from policies issued over an extended period of time, beginning in the years during which the product was manufactured, sold or used, or the wastes were deposited, even if the injury or damage was not discovered until many years later. *See, e.g., Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr. 2d 690, 715 (Cal. Ct. App. 1996) (adopting a coverage period that commences with the claimant's exposure to a policyholder's product and ends with the date of the claim or death, whichever occurs first). If any of these policies were issued by insurers that subsequently became insolvent, corporate policyholders must look to the estates of insolvent insurers to recoup whatever portion they can of the coverage the insolvent insurers wrote.

Corporate policyholders face a difficult—and often hopeless—task in this regard. State law regulates insurance insolvencies, and a complex and often conflicting array of statutory requirements governs them.[2] State liquidation procedures, while based in part on uniform or model acts, vary significantly from state to state. Additionally, because insurers generally do business in more than one state, the laws of many jurisdictions may be implicated when an insurer becomes insolvent. Thanks to this patchwork quilt of regulation, many corporate policyholders never obtain recoveries for "long-tail" liabilities. And, even if a corporate policyholder properly preserves its claims with the liquidator

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[2] The McCarran-Ferguson Act reserves regulation of insurance to the states. *See* 15 U.S.C. §§ 1011-1015 (1998). Insurers are likewise excluded from the provisions of federal bankruptcy law. *See* 11 U.S.C. §§ 701-706 (1998).

of the insolvent insurer for losses that become known later, "[h]istory has shown that failed insurers may take years to pay all of their liabilities. Policyholders of the failed organizations face potential delays [and] incomplete or disputed claim payments . . . ." Ronald Gift Mullins, *Insurance Industry Still Strong Despite 35 Insolvencies in 1999*, J. COM. 10 (May 15, 2000).

B. The Creation of State Guaranty Funds

The frequent lack of sufficient assets in the estates of insolvent insurers has forced policyholders to pursue recovery from state guaranty associations. States began to form these associations in the late 1960s to provide policyholders with an alternative avenue to recoup their claims against insolvent insurers. By 1983, the guaranty association concept had been universally adopted, with guaranty funds in place in all fifty states, the District of Columbia, the Virgin Islands and Puerto Rico.

Most jurisdictions adopted the Post-Assessment Property and Liability Insurance Guaranty Association Model Act drafted by the National Association of Insurance Commissioners ("NAIC Model Act"). *See* REFERENCE HANDBOOK ON INSURANCE COMPANY INSOLVENCY 717-97 (ABA Tort & Ins. Prac. Sec., 3d ed. 1993) ("ABA Handbook").[3] Under the NAIC Model Act, guaranty funds handle claims much as insurance companies do—they accept or deny claims and litigate coverage issues with policyholders. *See* NAIC MODEL ACT § 8(A)(4) (1996). The statutory purpose of these guaranty funds is to place claimants in the same position they would have been in had the insurer not become insolvent; in effect, each fund "stands

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[3] The ABA Handbook contains a state-by-state summary of guaranty association provisions compared to the NAIC Model Act. *See id.* at 730-97.

in the shoes" of the insolvent insurance company.[4] *See* NAIC MODEL ACT § 8(A)(2).

Recovery is permitted for "covered claims" as defined by each state's statutory scheme. Generally, guaranty associations provide recovery for insureds who are residents of the state at the time of the insured event and for claims arising from property permanently located in the state or from injuries to tort claimants living in the state. *See* NAIC MODEL ACT § 5(F)(1), (2). Thus, major corporate policyholders may seek recovery from a number of guaranty funds for "long-tail" product and environmental claims in a number of jurisdictions other than the one in which the policyholder is located. For example, Petitioner Pfizer Inc ("Pfizer"), a New York insured, has a right to recover from guaranty associations in all states where the underlying tort claimants reside or where property giving rise to the claim is located, including but not limited to Texas.

The NAIC Model Act generally provides for the creation of a nonprofit, unincorporated association to respond to such "covered claims"; the association is comprised of all licensed insurers selling the type of insurance covered by the association. NAIC MODEL ACT § 6. The Texas Property and Casualty Insurance Guaranty Association ("Texas Fund"), for example, has as members those insurers licensed to sell property and casualty insurance in Texas and is financed in part by an assessment on insurance premiums for policies sold by member insurers within the state. *See* TEX. INS. CODE ANN. art. 21.28-C, §§ 6, 8(c) (West 1981 & Supp. 1999); *see also* TEX. PROPERTY & CAS. INS. GUAR. ASS'N PLAN OF OPERATION § 3(a) (App. 19). Insurance companies

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[4] The guaranty association is "deemed the insurer to the extent of its obligation on the covered claims and to that extent shall have all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent." NAIC MODEL ACT § 8(A)(2).

covered by a guaranty association are required to be members of the guaranty association of a particular state as a condition of doing business in that state. *See* NAIC MODEL ACT § 6. Consequently, major insurance companies that insure national and international risks and are licensed to do business in all fifty states, the District of Columbia, the Virgin Islands and Puerto Rico must join, and pay assessments to, fifty-three different guaranty associations.

C. Policyholder Litigation with State Guaranty Funds

Policyholder demands on these guaranty funds—resulting in large part from the significant insolvencies of the late 1980s and early 1990s—continue to be pressed and assessments on member insurance companies continue to grow.[5] These increasing financial pressures have led some guaranty funds to dispute their obligations to pay policyholders. *See* Paul Sugarman, *Insolvent Carriers and State Insurance Guaranty Funds*, presented at The Environmental Law Institute, May 17-18, 1990, at 29.

When these disputes arise, corporate policyholders have limited options. A policyholder has recourse only against a guaranty association, and not its members, as there is no statutory provision for several liability. The members likewise have no obligation to pay covered claims—only the association does. *See* NAIC MODEL ACT § 8(A)(1); TEX. INS. CODE ANN. art. 21.28-C, § 8(a).

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[5] From 1969 through 1998, guaranty funds assessed insurers a total of $6.3 billion. In 1998 alone, these funds assessed insurers $264 million to pay for insolvencies, an increase of 13.9 percent over the 1997 amount and more than double the total in 1995, when assessments totaled $95 million. *See* Insurance Information Institute, Inc., *Insolvencies/Guaranty Funds*, INS. ISSUES UPDATE (Ruth Gastel ed., Feb. 2000).

The NAIC Model Act and the Texas statutory scheme further provide that a guaranty association may "sue or be sued," but do not specify a forum for such suit. NAIC MODEL ACT § 8(B)(3); TEX. INS. CODE ANN. art. 21.28-C, § 8(h)(3). For this reason, an out-of-state policyholder often finds itself in a Catch-22 situation. If the policyholder sues a foreign guaranty association in the policyholder's home state, the nonresident guaranty association asserts that the court lacks personal jurisdiction, even though member insurers of the association are citizens of the forum state. *See* TEX. INS. CODE ANN. art. 21.28-C, § 8(b) (the Texas Fund does not stand in the shoes of the insolvent insurer for personal jurisdiction purposes); *see also, e.g., Texas Property & Cas. Ins. Guar. Ass'n v. Boy Scouts of Am.*, 947 S.W.2d 682, 686-87 (Tex. Ct. App. 1997, no writ); *Pennsylvania Life & Health Ins. Guar. Ass'n v. Superior Court*, 27 Cal. Rptr. 2d 507 (Cal. Ct. App. 1994); *Georgia Insurers Insolvency Pool v. Brewer*, 602 So. 2d 1264 (Fla. 1992). Conversely, if the policyholder sues in federal court based on diversity jurisdiction, the guaranty fund (as the Texas Fund did here) argues just the reverse, and claims that it is a citizen of every state where a "member" insurer resides. *See, e.g., Temple Drilling Co. v. Louisiana Ins. Guar. Ass'n*, 946 F.2d 390, 392-93 (5th Cir. 1991); *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674 (2d Cir. 1990). Given the number of insurer members of a fund, the result is that there is virtually no state in which a federal court has diversity jurisdiction over a policyholder's suit against a state guaranty fund.

II. A STATE GUARANTY FUND, LIKE A CORPORATION, SHOULD BE DEEMED A CITIZEN OF THE STATE THAT CREATED IT.

The issue here is whether, for purposes of diversity jurisdiction, the Texas Fund, an unincorporated association created by the Texas legislature, should be deemed a citizen of Texas, or a citizen of every state of which one of its

member insurers is a citizen. The courts below adopted the latter rule on the ground that this Court's decision in *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), compelled it. According to the lower courts, *Carden* adopted a "bright-line" rule: "with the exception of corporations, the citizenship of an entity or association made up of multiple members must be determined by the citizenship of all the members." (App. 4-5.)

But this Court has yet to decide how citizenship should be determined for entities such as state-created guaranty funds, which have a unique quasi-governmental function. Granting the Petition will afford this Court with an appropriate vehicle to do so. *See Carden*, 494 U.S. at 199 (O'Connor, J., dissenting) ("'[A]pplication of statutes to situations not anticipated by the legislature is a pre-eminently judicial function.'" (citation omitted)). For the reasons stated in Pfizer's Petition, guaranty funds should be given the same fictional treatment long accorded to corporations for diversity purposes, and be deemed citizens of the states that created them.[6] Such treatment would prevent forum shopping by a fund and guarantee an out-of-state policyholder an impartial federal forum in the fund's home state.

In Parts II.A-C below, we show that such a result would be consonant with this Court's diversity jurisdiction precedent governing unincorporated associations.

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[6] For over 150 years, a corporation has been considered to be a citizen of the state that created it, regardless of the citizenship of its stockholders. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 & n.7 (1980).

A. As in *Navarro*, Member Insurers Are Not Parties in Interest to Policyholder Suits Against Guaranty Associations.

In *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 464-66 (1980), this Court decided that the trustees of an unincorporated business trust could invoke the diversity jurisdiction of the federal courts on the basis of their own citizenship, without regard to the citizenship of the trust beneficiaries. The Court so held on the ground that the trustees were "real and substantial parties to the controversy," because only they (and not the beneficiaries) possessed "full power to manage and control" the trust, to transact the business of the trust, to initiate and control litigation, and to sue and be sued in the name of the trust. *Id.* at 460-61, 464-65.

Application of the *Navarro* test to a guaranty association like the Texas Fund leads to the same result: the citizenship of member insurers should not be considered for purposes of diversity jurisdiction because they are not "real and substantial" parties to any controversy involving the association's payment of policyholder claims. All a member insurer in a guaranty association can do is to pay assessments levied to meet the outstanding obligations of insolvent insurers.[7] NAIC MODEL ACT §§ 5(H)(2), 8(A)(3); TEX. INS. CODE ANN. art. 21.28-C, § 8(c). As in *Navarro*, it is the guaranty *association*—not any member—that (1) pays the covered claims; (2) stands in the shoes of the insolvent insurer; (3) exercises the insurer's rights, duties and

[7] Contrary to the Texas Fund's assertion in the court of appeals below, a member insurer's assessment obligations are capped at two percent of that insurer's premiums in the prior year. *See* TEX. INS. CODE ANN. art. 21.28-C, § 8(c); NAIC MODEL ACT § 8(A)(3). Given the number of insurers that contribute to each fund, any one member insurer has an insignificant financial interest in suits involving the fund.

obligations as if the insurer had not become insolvent; (4) investigates claims brought against the *association*; (5) settles and pays covered claims to the extent of the *association's* obligations; and (6) can "sue or be sued." NAIC MODEL ACT § 8(A)(1)-(4), (B)(3); TEX. INS. CODE ANN. art. 21.28-C, § 8.

B. As in *Russell*, Guaranty Associations Are Creatures of State Law.

This Court has held that a *sociedad en comandita*, a membership organization created under the Civil Code of Puerto Rico, is a juridical person for diversity purposes. *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 481-82 (1933). Critical to the Court's conclusion there was that the *sociedad* had its roots in a body of civil law that did not give members the right to intervene in lawsuits, or subject them to liability for the *sociedad*'s acts and debts. *See id.* at 481. The Civil Code vested such rights in, and imposed such liabilities on, the *sociedad* alone and not on its members, and only the association had the power to contract, own property, transact business and sue and be sued. *Id.*

The Texas statute, which is based on the NAIC Model Act that forms the basis of the statutory insurance guaranty scheme in almost all states, is strikingly similar to the Civil Code: the Texas law extends the same protections to member insurers and likewise holds the guaranty association responsible for the obligations it is assigned. TEX. INS. CODE ANN. art. 21.28-C, § 8. The analysis in *Russell* thus also supports the conclusion that guaranty funds are distinct from their members for diversity purposes.

C. The Concerns Raised in *Bouligny* Are Not Present Here.

In *United Steelworkers of America v. R. H. Bouligny, Inc.*, 382 U.S. 145, 146-47 (1965), this Court ruled that a labor union was a citizen of every state of which its members were

citizens. That decision flowed from several concerns specific to labor unions that do not apply to guaranty funds. First, the Court was of the view that it could not assume that the union's situation was sufficiently typical to form the basis of a diversity jurisdiction principle. *Id.* at 152. That is not the case with guaranty associations. Forty-nine of the fifty-three statutory schemes providing for guaranty funds are based on the NAIC Model Act. *See* ABA HANDBOOK at 731. More importantly, all but two of the fifty-three state guaranty fund statutes consider guaranty associations to be unincorporated associations for diversity purposes (Florida and Maryland consider such entities to be corporations). *See id.* at 744-97 (summarizing the incorporated or unincorporated status of each guaranty association). A determination that guaranty funds will be considered citizens of their state of creation would therefore have ready and straightforward application.

Second, the Court in *Bouligny* concluded that it could not fashion a test to determine a labor union's citizenship, and noted the complications arising from the local and national structure of labor unions that might have an impact on their treatment for diversity purposes. *Bouligny*, 382 U.S. at 152-53. Guaranty funds present neither difficulty. A rule that a guaranty association, created by a state legislature to protect state residents who are insureds, claimants or owners of property within the state, will be deemed a citizen solely of the state of its creation would have the "certainty of application" found lacking in *Bouligny*. *Id.* at 152.

CONCLUSION

For the foregoing reasons, and those advanced in Pfizer's Petition, the Petition should be granted.

Respectfully submitted,

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